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33727

THEODORE J. MANGEN, Administrator
of the Estate of Theodore J. Mangen,
Jr., Deceased,

Appellee,

vs.

CENTENNIAL LAUNDRY COMPANY, a
Corporation,

Appellant.

4/60
247
92
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

257 I.A. 623

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$7,000 entered upon the verdict of the jury in an action brought by the administrator to recover damages for the death of Theodore J. Mangen, Jr., as the result of defendant's alleged negligence in driving its automobile.

The accident happened May 25, 1927, about 12:45 p. m. on a bright dry day. Theodore J. Mangen, Jr., hereafter called plaintiff, was then a few days over seven years and three months of age. He lived with his parents on Iowa street, which runs east and west, a few doors west of Robey street, which runs in a north and south direction. He had eaten his luncheon at home and was returning to his school, which was some distance south of Iowa street and east of Robey street. About a block south of Iowa street and parallel to it there is an alley. Apparently plaintiff walked south on the west side of Robey street until he reached the north side of this alley, where he left the sidewalk and started directly east across Robey and had reached the south-bound street car tracks, when he was struck by defendant's one-ton automobile truck, receiving injuries from which he died the following day.

The declaration originally consisted of three counts. The first alleged that the accident happened May 25, 1927, and that plaintiff was a child of tender years, to-wit, seven years of age, in the exercise of such care as the law required of him.

THOMAS J. HANCOCK, Administrator
of the Estate of Theodore J. Hangan,
Plaintiff,

vs.

GENERAL LAMBERT COMPANY, a
Corporation,
Defendant.

MR. PRESIDING JUSTICE NEWMAN
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$7,000 entered upon the verdict of the jury in an action brought by the plaintiff to recover damages for the death of Theodore J. Hangan, Jr., as the result of defendant's alleged negligence in driving its automobile.

The accident happened May 28, 1927, about 12:45 p. m. on a bright dry day. Theodore J. Hangan, Jr., hereafter called plaintiff, was then a few days over seven years and three months of age. He lived with his parents on Iowa street, which runs east and west, a few doors west of Hobey street, which runs in a north and south direction. He had eaten his lunch at home and was returning to his school, which was some distance south of Iowa street and east of Hobey street. About a block south of Iowa street and partly to it there is an alley. Apparently plaintiff walked south on the west side of Hobey street until he reached the north side of this alley, where he felt the sidewalk and started directly east across Hobey and had reached the south-bound street car tracks, when he was struck by defendant's one-ton automobile truck, receiving injuries from which he died the following day.

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257 I.A. 623

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

The second count alleged that defendant's motor vehicle was driven at an unreasonable and unsafe rate of speed. The third count charged wilful and wanton negligence and also alleged that the suit was brought within one year next following the death of plaintiff, and that letters of administration had been granted by the Probate court of Cook county. This third count was withdrawn during the trial and defendant argues that by so doing there was withdrawn from the declaration the allegation that suit was brought within one year after the intestate's death and also the allegation of the authority of the administrator to act.

It has been repeatedly held that where a count of a declaration has been stricken, it is still in the record for reference purposes. Hughes v. Eldorado Coal & Mining Co., 197 Ill.App. 259; Verjan v. Evening American Publishing Co., Appellate Court number 33761, opinion filed February 24, 1930.

Where the declaration shows that the accident happened May 25, 1927, and suit was commenced June 21, 1927, sufficient facts appear to disclose affirmatively that the action was brought within one year after death. We hold that the declaration sufficiently stated a cause of action and that any deficiencies in statement therein were cured by verdict.

It is said that the conduct of the trial Judge was such as to constitute reversible error. We find no ground for this criticism. Some remarks about which complaint is made were directed to the lawyers in the case, out of the hearing of the jury. We gather from the record that the trial court was zealous in attempting to give both sides a fair and impartial trial and that nothing said by it could be considered improper.

The declaration alleged that defendant's automobile truck ran upon and against plaintiff, but, it is said, the evidence

The second count alleged that defendant's motor vehicle was driven at an unreasonably and unsafe rate of speed. The third count charged willful and wanton negligence and also alleged that the suit was brought within one year next following the death of plaintiff, and that failure of administration had been extended by the Probate Court of Cook County. This third count was withdrawn during the trial and defendant argues that by so doing there was withdrawal from the declaration the allegation that suit was brought within one year after the intestate's death and also the allegation of the authority of the administrator to sue.

It has been repeatedly held that there is a count of a declaration has been withdrawn, it is still in the record for reference purposes. Hubert v. Edwards and a third et al., 107 Ill. App. 200; Bellevue v. Ketchum and others, 107 Ill. App. 200. Number 35751, opinion filed February 24, 1930.

Where the declaration shows that the accident happened May 20, 1927, and suit was commenced June 21, 1927, sufficient facts appear to establish affirmatively that the action was brought within one year after death. We hold that the declaration sufficiently stated a cause of action and that any defect in statement therein were cured by verdict.

It is said that the conduct of the trial judge was such as to constitute reversible error. We find no ground for this criticism. Some remarks about which complaint is made were directed to the lawyers in the case, out of the hearing of the jury. We gather from the record that the trial court was anxious to accomplish to give both sides a fair and impartial trial and that nothing said by it could be considered improper.

The declaration alleged that defendant's automobile truck ran upon and against plaintiff, but, it is said, the evidence

shows the defendant ran into the side of the truck; hence, there is a variance. There was sufficient evidence for the jury to believe that the automobile struck the plaintiff. At least, two witnesses so described the accident. In any event, defendant did not raise the question of variance upon the trial, and it is too late to raise it for the first time in a court of review. Wabash R. R. Co. v. Billings, 312 Ill. 37.

Was the verdict of the jury contrary to the weight of the evidence? Three occurrence witnesses testifying on behalf of plaintiff said, in substance, that he walked from the west side of Robey street into the street, walking leisurely or, as one witness described it, "moving pretty rapidly, a nice little walk, a regular baby walk;" that defendant's automobile was driven southward in the middle of the street at a rate of speed estimated by plaintiff's witnesses as between 30 and 35 miles an hour; that there was nothing on the west side of Robey street to prevent the driver from seeing the plaintiff; that from a point 350 feet north of where plaintiff was struck there was no change of speed until the boy was struck. The only witnesses testifying for defendant were the driver of the truck and a police officer who arrived on the scene of the accident after it happened. This driver gave his speed at 12 miles an hour and said there was an automobile parked near the curb which prevented him from seeing the boy until too late to avoid striking him; that he first saw the boy when he appeared at his fender, when he put on his brakes to stop the car. He says his automobile went five or six feet after it struck the boy, but other witnesses said it proceeded in a southeasterly direction and was stopped by the curbing on Robey street, about 29 feet south of the alley. The driver said there was a colored man riding on the truck with him who disappeared after the accident. The driver admitted that for the distance of 140 feet before striking the boy he had not changed

the speed of his truck. The police officer gave it as his opinion, based on the skidding marks on the street, that defendant's automobile was going around 20 miles an hour. The accident happened in a thickly populated residence and business district of Chicago.

Considering the variant testimony, the jury could properly believe that defendant's automobile was going at a fast speed; that the driver had an uninterrupted view of the west sidewalk of Hobey street and could have seen the plaintiff leave the sidewalk, walking slowly, in sufficient time to have avoided striking him if he had been watchful and had reduced the speed of his truck. The jury could conclude that in failing to do so defendant's driver was negligent, causing the injury to plaintiff.

The question of culpability of a child between the age of seven and fourteen years is a question of fact. The jury could properly find that plaintiff was not guilty of contributory negligence, considering his age, capacity, intelligence and experience. Stack v. East St. Louis M. & Ry. Co., 245 Ill. 308; Heming v. City, 321 Ill. 341; Marshallman v. C. & N. W. T. A. Co., 318 Ill. 148.

We find no reversible error in the rulings on the instructions and we cannot say that the verdict is excessive. Larger amounts have been awarded in other cases under similar circumstances.

We would not be justified in reversing the judgment and it is therefore affirmed.

AFFIRMED.

Katchett and O'Connor, JJ., concur.

33787

NORA JOHNSON,
Appellee,

vs.

JAMES JOHNSON,
Appellant.

9 3a
APPEAL FROM CIRCUIT COURT
OF COLE COUNTY.

MR. PRESIDING JUSTICE McSWEENEY
DELIVERED THE OPINION OF THE COURT.

Defendant seeks the reversal of an order that a writ of attachment issue against him commanding that he be brought before the court to show cause why he should not be committed to jail for contempt. The order was issued upon a moving that defendant was in arrears in paying alimony under a decree secured by complainant granting her a divorce, entered August 19, 1927.

We do not understand that this is an appealable order. It does not contain any finding that defendant is in contempt of court nor is there any punishment imposed by the court. The writ of attachment in a case of this sort is only for the purpose of procuring the presence of defendant in court.

If the court should find defendant in contempt and punish him by a sentence to jail, such an order could be reviewed by this court. The order appealed from is merely one of the steps looking to a final order and is not appealable.

The appeal will therefore be dismissed.

APPEAL DISMISSED.

Ketchett and O'Connor, JJ., concur.

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53796

FOREMAN TRUST & SAVINGS BANK,
Administrator of the Estate
of Thomas M. Runnels, Deceased,
Appellee,

vs.

CHICAGO & EASTERN ILLINOIS
RAILWAY COMPANY, a Corporation,
Appellant.

94a
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

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MR. PRESIDING JUSTICE MCCORMY
DELIVERED THE OPINION OF THE COURT.

March 1, 1927, Thomas M. Runnels, married, thirty-nine years of age, while driving his automobile west on East Main street in Benton, Franklin county, Illinois, across the tracks of defendant, was struck by a north-bound freight train and died from the resulting injuries. His administrator brought suit to recover damages and upon trial had a verdict for \$10,000. Defendant appeals from the judgment.

The declaration alleged that defendant owned and operated a steam railroad running through Benton, crossing East Main street at grade, and while plaintiff's intestate was in the exercise of due care for his own safety, defendant so negligently operated its railroad train that it ran against the automobile driven by plaintiff's intestate. The second count alleged that the engine on the train was carelessly run across said public highway without ringing the bell and without having a sufficient headlight and without giving any warning of the approach of said train. The third count averred a failure to guard and protect said railroad crossing in that defendant failed to have any watchmen or gates at the crossing.

The principal defense asserted is the contributory negligence of Runnels, hereafter called plaintiff.

At Benton the tracks of defendant are at grade, run-

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THE UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
BUREAU OF MARITIME SERVICE
WASHINGTON, D. C.

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MAR 1 1917

TO THE SECRETARY, MARITIME SERVICE, WASHINGTON, D. C.

FROM THE SECRETARY, MARITIME SERVICE, WASHINGTON, D. C.

SUBJECT: [Illegible]

RE: [Illegible]

1. [Illegible]

2. [Illegible]

3. [Illegible]

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18. [Illegible]

ning north and south. East Main street crosses them, running east and west. The depot is on the west side of the tracks, a little over 300 feet south of East Main street. Approximately 625 feet south of East Main street is Webster street, and approximately 1313 feet south of East Main street are the tracks of the Illinois Central railroad, which cross defendant's tracks at right angles. Defendant's tracks run straight from this point northward to East Main street.

There are five tracks crossing East Main street. The most westerly of these is the main track on which the regular trains run. The next track to the east is called the passing track, used when the trains pass each other at that point. The next is called the storage track, the next the tone track, and the next or fifth is a track leading off to a building located east of the tracks and north of East Main street. There are no buildings to the south of East Main street so near to the tracks as to obstruct the view to the south; the only obstruction was certain freight cars standing on the storage track, which is the third track from the west or main track where the accident in question happened. There is a street light about 75 feet west of the tracks in the middle of the street.

The accident happened about 5:15 o'clock in the morning and it is conceded that at this time of day no watchman was at the crossing and none had ever been kept there at that hour and no gates nor signals were maintained and never had been. The train involved in the accident was a freight hauling coal which ran from West Frankfort, Illinois, northward to Benton five miles away and thence to Salem, which is about 30 miles north of Benton. On this morning it left West Frankfort northbound at about four o'clock, reaching Benton at about five o'clock a. m. During the winter months, when the coal mines are working, a number of freight trains

[illegible][illegible][illegible]

run back and forth through Benton at irregular intervals.

Plaintiff was a coal miner and for a number of years prior to the accident had lived in Benton and was familiar with the crossing in question, crossing it many times in going back and forth to his work. He lived east of the tracks and upon this morning, which was dark and foggy, left home in his automobile about five o'clock, moving westward along East Main street towards defendant's tracks.

J. W. Harben, one of plaintiff's witnesses, testified that just before the accident he was walking west on East Main street toward the tracks; that when he was about 75 feet west of the tracks he saw and heard the train approaching from the south; that it was then about 125 or 130 feet away, coming at about 15 miles an hour; that the headlight was burning; that he noticed plaintiff just a few seconds before the accident; that he did not know whether plaintiff stopped before coming onto the crossing or not, but that the train was moving north all the time and plaintiff was moving west; that plaintiff's automobile turned a little to the north at the time it was struck with the front of the engine; that he did not hear the whistle blown or bell rung, but the train made a noise, rumbling like a freight train; that there were no cars on the first track east of the main track, but there were some cars on the second track, about 4 or 5 feet from the sidewalk. The witness thought there were cars there every time he went across.

Two other witnesses for plaintiff were approaching the crossing from the west on East Main street in a closed automobile. They stopped in the neighborhood of 100 or 125 feet west of the track because they saw the train coming from the south; they heard the puffing of the engine; the headlight was burning, although it looked dim; they judged the train was going from 15 to 20 miles an hour. One of them observed cars standing on the railroad track

For more on this subject, please see:

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the standing in general, especially in the case of the

...and the

disposition, I'd at least find out what was going on.

Source: U.S. Census Bureau, *Marriage, Divorce, Remarriage in the 1990s*, 1995.

Journal of Interpersonal Violence 24(1)

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Die Studie ist ein Beitrag zur (nicht-quantitativen) Sozialforschung.

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the three trucks used at the main camp, but there were only two.

the second story, about 4 or 5 feet 2 or 3 inches above the ground.

and delivered to the Village of Monticello under seal

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They stopped in the neighborhood of 1000 East 17th St.

Rock Island, Iowa, 1900

14. The following information was furnished by the respondent to the auditor:

and the other two are the same as in the first case.

within three or four feet of the south cross-walk, and testified that almost all of the time such cars were standing there; that anybody passing the crossing could see them. This witness said he did not hear any whistle or bell, but that he could hear the engine puffing.

Another witness, Martin Newson, testified that he was east of the tracks when the accident happened, walking north toward East Main street along a street running parallel with and just east of the railroad tracks; that as he came up toward the crossing he saw plaintiff's automobile, which was going from 15 to 18 miles an hour; that he did not see it stop and that to the best of his recollection it was moving all the time; that the automobile came in contact with the engine up toward the front end of it; that he heard the train before it got to the crossing; that he could hear it puffing while it was still two blocks away from the crossing.

Edward Pent testified that he was east of the railroad tracks, driving west toward defendant's tracks, going 10 or 15 miles an hour; that when he was about 75 feet from the tracks, plaintiff in his automobile passed him going from 15 to 20 miles an hour; that plaintiff drove up to the crossing and came to a stop before he got to the most easterly track and started up again and was struck by the train. An attempt was made to impeach the testimony of this witness by showing that he had signed a written statement sometime before, in which he had said that plaintiff passed him going at the rate of 20 to 25 miles an hour and without stopping drove onto the track and ran into the side of the engine. We are inclined not to place much faith in the testimony of this witness. However, we do not think the fact, if it is a fact, that plaintiff came to a stop before reaching the most easterly track is of controlling importance.

The engineer of the freight train testified that it consisted of 56 earloads of coal; that it came to a stop at the

He did not want any children or family and lived in a small room in the
slightly elevated and somewhat noisy and damp. This apartment was
that almost all of the time was not very pleasant and that
within three or four days of the same apartment, and finally

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The evidence at the Toledo train revealed that it

not to give a chance of doubt; and to whisper it to believe

Illinois Central cross-over and then started northward after giving two long blasts of the whistle; that the automatic bell was ringing; that as he proceeded north he whistled again as the train crossed Webster street and that he gave two long and two short blasts when he was just opposite the station which is about 300 feet south of East Main street; that the automatic bell was ringing continuously, and that the engine was equipped with an electric headlight which was burning; that as he approached the crossing the train was going at the rate of about eight miles an hour; that he noticed some automobiles coming from the east, going west along East Main street, and blew the whistle extra hard, but that just as the engine got on the crossing plaintiff's automobile ran into and struck the engine just behind the cylinder, which is about 8 or 10 feet from the front end of the engine, breaking off the back cylinder cock and damaging the cylinder head and foot rail; that he applied the emergency brake and stopped the train within three or four carlengths; that he saw plaintiff's car coming and in his opinion it was coming at about 25 or 30 miles an hour. Other members of the train crew gave testimony to the effect that the crossing whistles were sounded and the automatic bell was ringing continuously from the time they left the Illinois Central cross-over. The telegraph operator in the station testified that he had heard the first whistle at the Illinois Central cross-over and another as the train crossed Webster street and again when the engine was in front of the station; that the engine lights were burning and the automatic bell ringing. Joe Meyers, a coal miner, testified that he lived east of the tracks and usually in going to work crossed them at Webster street; that on this morning, as he approached the tracks, the freight train was going by and after four or five cars had passed he caught onto a car and rode down

to about the north end of the depot; that the train was not going over ten miles an hour; that there was a headlight on the engine and the bell was ringing but he did not hear the whistle.

Defendant introduced evidence tending to show that there were five cars on the team track, which is the fourth track from the west; that the first of these was 103 feet south of the center of Main street; then an open space of 55 feet; and then four cars coupled together; that on the storage track, which is the third track from the west, there was one car which was 350 feet south of East Main street; that there were no cars on the passing track.

Upon the evidence thus outlined we should have no hesitation in arriving at the conclusion that the verdict of the jury upon the question of defendant's negligence was against the manifest weight of the evidence. There is virtually no evidence tending to support any allegations of the negligent operation of the train. It is not claimed that defendant violated any ordinance or statute or regulation of the Illinois Commerce Commission with reference to gates or flagman, nor was it charged or proven that there were any special conditions creating special danger at the crossing requiring such safeguards. Buller v. Illinois Traction, Inc., 253 Ill. App. 135; Opp v. Pryor, 294 Ill. 538.

At the close of all the evidence defendant moved the trial court to instruct the jury to find the defendant not guilty, which motion was denied. We are asked to hold that this ruling was error based upon the ground that the evidence shows, as a matter of law, that plaintiff was guilty of contributory negligence bringing about his death. We are inclined to the opinion that this must be held.

Plaintiff was thoroughly familiar with the crossing,

as he had regularly crossed it for years on his way to work every morning. He knew there were no gates, as none had ever been maintained there, and also that there was no watchman kept there at the time of day the accident happened, and that many freight trains ran over this crossing both day and night. He also knew that cars were always standing close to the street on the tracks south of East Main street. On this morning he could have seen the cars standing there, and he also knew the weather condition as to its being foggy. There were no cars on the track next east to the main track. Although there is some argument as to the exact distance, yet from a point at least 16 feet to 20½ feet west of the main track, there was a wholly unobstructed view to the south along the straight track for a distance of approximately 1300 feet. If plaintiff drove onto the track without stopping to ascertain whether or not a train was approaching, he was guilty of contributory negligence. If, however, as the witness Fent stated, he stopped east of the most easterly track and then drove onto the main track without stopping, he was equally guilty of contributory negligence, for the distance from the east rail of the main track to the east rail of the most easterly track is 62 feet.

Plaintiff's automobile ran into the engine at the side, right behind the cylinder, which is about 8 feet from the front, breaking the cylinder cock and damaging the cylinder head and foot rail. Plaintiff's witnesses do not contradict this; they say that in their judgment the front part of the engine hit the automobile.

There have been a large number of decisions dealing with similar accidents since the well known decision in B. & O. R. R. Co. v. Goodman, 275 U. S. 65. This court under somewhat similar circumstances held plaintiff guilty of contributory negli-

at the very beginning of the war, the Government had been very anxious to get the people to buy war bonds and stamps, and to do this it had been necessary to get the people to understand the importance of the war. The Government had been very successful in this, and the people had been very patriotic. But now, when the war is over, the Government is still very anxious to get the people to buy war bonds and stamps, and to do this it has been necessary to get the people to understand the importance of the war. The Government has been very successful in this, and the people have been very patriotic. But now, when the war is over, the Government is still very anxious to get the people to buy war bonds and stamps, and to do this it has been necessary to get the people to understand the importance of the war. The Government has been very successful in this, and the people have been very patriotic.

They say that in their judgment the best part of the nation is
 dead and that this, Kennedy's viewpoint is not unshared with
 them, viewing the nation with an attitude of despair
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 Kennedy's attitude was then the subject of the

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gence as a matter of law in Goodman, Mfg. v. C. & N. E. Ry. Co., 248 Ill. App. 126; certiorari denied by the Supreme Court. Another similar case is Greenwald v. C. & N. E. Ry. Co., 340 Ill. App. 638, afterwards affirmed by the Supreme Court in 332 Ill. 637. Another pertinent case is Burns v. C. & A. R. Ry. Co., 332 Ill. App. 439, opinion by Mr. Justice Heard, now of the Supreme Court. Other similar cases are Kutchen v. A. T. & S. F. Ry. Co., 21 Fed. (2nd) 183. In Blunt v. C. M. & St. P. Ry. Co., 34 Fed. (2nd) 43, the evidence showed that from a point 16 feet away from the track the plaintiff could see for a distance of 305 feet in the direction of the approaching train, and after driving his automobile near the track he walked to the track, looked in both directions and thereafter started his automobile. In Gertlich v. C. & N. E. Ry. Co., 29 Fed. (2nd) 112, where the plaintiff drove a heavily loaded truck onto a crossing from behind box cars "which shut off his view in the direction from which the train was approaching," it was held that he took no precautions other than stopping just before reaching the box cars and listening for the train with the noisy motor of his truck still running. The opinion said: "He knew, or should have known, that, if it (the train) was approaching, he would be in the danger zone before he could see it. He voluntarily took the chance which the situation involved." In Reuninger v. C. & N. E. Ry. Co., 221 N. W. (Mich.) 273, plaintiff claimed that he could not see the approaching train because of obstructing gondola cars. The court said: "While in a zone of safety plaintiff was unable, without stopping, to see whether he could safely proceed. He did not stop, and, without being able to see whether the way was clear, drove into the path of the locomotive." To the same effect is Davis v. Pere Marquette Ry. Co., 216 N. W. (Mich.) 404, where, while 40 feet away from the tracks, plaintiff could not see because of box cars, shanties and an elevator, but hearing no train started

1. The first question is whether the defendant is a person of good character. The evidence shows that the defendant is a person of good character.

2. The second question is whether the defendant is a person of good character. The evidence shows that the defendant is a person of good character.

3. The third question is whether the defendant is a person of good character. The evidence shows that the defendant is a person of good character.

4. The fourth question is whether the defendant is a person of good character. The evidence shows that the defendant is a person of good character.

5. The fifth question is whether the defendant is a person of good character. The evidence shows that the defendant is a person of good character.

6. The sixth question is whether the defendant is a person of good character. The evidence shows that the defendant is a person of good character.

7. The seventh question is whether the defendant is a person of good character. The evidence shows that the defendant is a person of good character.

8. The eighth question is whether the defendant is a person of good character. The evidence shows that the defendant is a person of good character.

9. The ninth question is whether the defendant is a person of good character. The evidence shows that the defendant is a person of good character.

10. The tenth question is whether the defendant is a person of good character. The evidence shows that the defendant is a person of good character.

to make the crossing. In Tull v. N. & O. R. Co., 141 Atl. (Pa.) 263, from a point 25 feet from the rail, there was an open view along a straight track for a long distance. In Cresley v. Boston & M. R. R., 161 N. E. (Mass.) 584, the plaintiff when about five feet away from the track had a clear vision for at least 400 or 500 feet in the direction from which the train came. In all of these cases it was held to be contributory negligence to attempt to cross the track. Such cases could be multiplied indefinitely.

We are inclined to be in accord with the comment of Judge Fitzhenry in Conrad v. Whelan, 24 Fed. (2nd) 996, on the language of Mr. Justice Holmes in N. & O. R. R. Co. v. Goodman, 275 U. S. 65. In the Conrad case Judge Fitzhenry said: "I do not understand that the Supreme Court of the United States laid down any new rules in the Goodman case. It does not reverse, or modify, or change, in any respect, the substantial rules in negligence cases of the character there disposed of by the court," but that the Goodman case was intended to admonish courts that it was their duty to apply the law in cases of this character.

Consideration of the facts before us compels to the conclusion that plaintiff in the exercise of due care, from a place of safety, could or should have both seen and heard the approaching train in ample time to have avoided the collision. His failure to do so was negligence contributing to the accident, as a matter of law. The judgment is therefore reversed with a finding of fact, and the cause is not remanded.

REVERSED WITH FINDING OF FACT.

Matchett, J., concurs.

O'Connor, J.: I agree with conclusion but not in all that is said in the opinion.

FINDING OF FACT.

We find, as a matter of law, that the plaintiff was guilty of negligence directly contributing to his death, and that the trial court should have directed a verdict for the defendant for the reason that the evidence did not tend to establish a cause of action.

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GUSTAV HOFFMAN,
Appellant,

vs.

JOHN H. McGEARY, ELIZABETH
McGEARY and TIMOTHY J. FELL,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

257 LA. 624

MR. PRESIDING JUSTICE McSURNELY
DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill asking the rescission of a real estate exchange contract, alleging fraudulent representations. Answers and a general replication were filed and the cause was referred to a master in chancery to take proof and report. The master found the issues for the defendants. Exceptions to the report were overruled by the chancellor, who ordered the bill dismissed for want of equity. Complainant appeals.

Without going further we would be justified in affirming the decree because of the character of the abstract filed in this court. Defendants' brief calls attention to the fact that, although the abstract purports to give the testimony of defendant McGeary, covering some 31 pages of the record, examination of the record discloses that no such testimony appears therein; that the record shows only one question was asked of the defendant. Again, complainant abstracts what purports to be the testimony of McGeary in the record pages 156-180. No such testimony appears in the record. Reference is made to the testimony of Thomas J. Bly as appearing in the record pages 182-191. No testimony of Bly appears in the record. Also the abstract purports to give the testimony of Washington Higgins. We find no testimony by this witness in the record. In his reply brief complainant does not question these statements of defendants' brief. We also have examined the record and abstract and find that defendants' criticisms are fully justified.

[illegible]

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The Bill contained the following provisions:-
 1. That the Secretary of State should be empowered to make regulations for the better management of the forests of the Crown.
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It has been repeatedly held that where testimony is inadequately abstracted the presumption will be indulged that the evidence, if properly abstracted, would sustain the judgment. Giles v. Shedd, 218 Ill. 309; Love v. Dick, 177 Ill. App. 98. The decree in this case should be affirmed on account of the imperfect and defective abstract.

However, upon the assumption that the abstract properly presents all of the evidence, we are of the opinion that the report of the master was proper and that the decree dismissing the bill should be affirmed.

The bill filed April 4, 1939, charged that defendant McGeary fraudulently represented the Chicago property to be worth \$75,000 with an annual rental income from \$10,000 to \$12,500, whereas he knew the building was worth between \$30,000 and \$35,000 and had a rental income not to exceed \$6,000 per annum. The answer of the defendant John E. McGeary and Elizabeth McGeary, his wife, denied any fraudulent representations as to the value of the property or the rental income. Defendant Fell answered denying that he had any interest in the contract and deal; that he was trustee only in the trust deed taken from complainant by McGeary as part of the purchase price.

It appears that defendant John E. McGeary advertised the property for sale or exchange in the Chicago Tribune about December 17, 1937; that complainant, then living in Huntington, Florida, wrote to him asking full particulars with reference to the Chicago property. Defendant McGeary answered the letter. The parties then had a conference in the early part of January, 1938, with reference to said deal and the price of defendant's property was fixed at \$65,000. Complainant and defendant went through the building, including the basement and boiler room, and afterwards went to the office of Timothy J. Fell, an attorney, to have a con-

tract drawn. Complainant had no lawyer, although advised by McGarry to employ one to represent him. January 6, 1926, the parties entered into an exchange contract, in which defendant and his wife agreed to convey the building located at 356-362 West 41st place in Chicago, improved with a three story brick building containing 24 apartments, to the complainant and Margaret Poppel, complainant's daughter, and Leonard Poppel, her husband, for the sum of \$83,000, a trust deed to be made by complainant to secure notes for \$25,000, and subject also to a second mortgage of \$20,000, to be signed by complainant; complainant agreed to convey 5 acres of land in Florida, and the balance to be paid in cash. Subsequently, complainant went again to the Chicago property to examine it and became dissatisfied with the condition of the premises and wrote to McGarry requesting that the contract be modified in certain particulars, which was not accepted by defendant. Thereafter complainant again expressed dissatisfaction with the contract on account of the uncertain character of the tenancy, in that they might move at any time, and asked defendant to guarantee three months rent at the rate of \$10,000 a year. Defendant agreed to this. Complainant, on January 30, 1926, wrote to defendant McGarry with reference to the condition and repairs needed and advised him it would take \$5,000 to put the property in shape and requested that the price of \$85,000 be reduced to \$60,000, so that complainant could take care of the repairs. Defendant McGarry agreed to accept \$60,000 on condition that complainant would take care of all repairs except certain small items which he, McGarry, repaired and paid for. It was also agreed that the amounts of the first and second mortgages on the property made by complainant should be reduced and instead of complainant paying any cash he gave a second mortgage on another piece of property in Chicago. The deal was closed February 23, 1926, on this basis. On March 3rd complainant sent a letter to McGarry requesting that a new boiler and a

gas range be put in the building and also asked for a further reduction in the amount of the mortgage and a readjustment of the taxes.

The master found that between January 6th, the date of the contract, and February 23, when the deal was closed, complainant had ample time to inspect said premises and, in fact, did inspect the same and thereafter made the various proposals with reference to reduction of the price. The master further found that the property had been sold two years prior in this transaction for the sum of \$75,000, and although there was conflicting evidence as to the value at the time of the sale, there was evidence that it was worth in the neighborhood of \$60,000. The master found that the contract was fairly made and no false representations were made to induce the complainant to enter into the contract; that complainant was not deceived by any of the representations and had ample time^{to} and did examine the property. The master also based his conclusion upon the fact that complainant never made a legal tender back to defendant and never made such a rescission of the contract as would place the defendant in status quo.

The evidence shows that John McGarry and his wife agreed to convey to Gustav Hoffman, Margaret Poppel, his daughter, and Leonard Poppel, her husband; the deed of conveyance ran to Gustav Hoffman and Margaret Poppel in joint tenancy. Although title to the property was still in their names at the time, Hoffman alone filed the bill of complaint. We do not see how he could maintain this bill alone. For all that appears in the record to the contrary, Margaret Poppel is satisfied with the transaction. We do not see how any final decree could be entered in this proceeding that would not materially affect her right. Objection to a lack of

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action in the matter of the bill and a preliminary to the

Bill.

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Bill has been introduced in the House of Representatives.

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proper parties in such a case may be taken at the hearing or in the court of review. Snopf v. Chicago Real Estate Board, 173 Ill. 196; Larson v. Glog, 235 Ill. 584.

more

Without going/into detail with reference to the evidence, we are of the opinion that the record, as presented in the abstract, justified the master's report and that the chancellor properly overruled the exceptions to the same. The decree dismissing the bill for want of equity is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

to be paid to the owner of the property in the event of its sale.

The Board of Directors of the company, in its resolution of the 17th

day of June, 1914, adopted the following resolution:

Resolved, That the Board of Directors of the company do hereby

authorize the President of the company to execute and deliver to the

proper authorities of the State of New York, a certificate of incorporation

in conformity with the provisions of the laws of the State of New York

relating to the incorporation of corporations, and to do all such

other acts and things

as may be necessary to carry out the purposes of this resolution.

34006

GUST GROSS,
Appellee,

vs.

JOSEPH RYLRG,
Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

25:1A:624

MR. PRESIDING JUSTICE ROSSNELY
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$329.25 entered upon a trial by the court. The suit was for labor and material, the last item of which was furnished February 20, 1924. Suit was commenced June 14, 1929, after the five year statute of limitations had run. This was one of the defenses presented in defendant's affidavit of merits. The appellee does not appear in this court to defend the judgment.

The trial took a somewhat curious angle. Plaintiff sued for \$550 and interest, or a total of \$701.25. Defendant alleged and testified that he had given plaintiff his note for \$550 in full settlement of all claims. Plaintiff testified to the same thing. Defendant seemed to concede that he was liable on the note, but plaintiff claimed that he was not suing on the note. The court announced that he would find for defendant if plaintiff was not suing on the note. After some talk the court announced he would find for the plaintiff in the sum of \$329.25 without giving any reason for this change of mind. Apparently the court based its finding upon the admission by defendant that he was liable for the amount of the note and entered judgment in the instant case for the amount of the note. Thereupon defendant's counsel asked that a notation be made on the note indicating that judgment had been entered thereon. The court declined to do this, saying that he was entering "judgment on the case."

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1. RESEARCH DESIGN

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As it is conceded that defendant gave plaintiff his note for \$325 in full of all claims, we do not understand upon what theory the court could enter the judgment in this case.

We hold that the court's first finding, as announced, was correct and that the judgment should be that plaintiff take nothing. The giving and taking of the note, which was marked as payment in full for the labor and material for which suit was brought, was a complete defense. Our holding does not affect in any way the right of plaintiff to sue upon this note.

For the reasons indicated the judgment is reversed and judgment that plaintiff take nothing will be entered in this court.

REVERSED AND JUDGMENT ENTERED.

Matchett and O'Connor, JJ., concur.

33654

THE PEOPLE OF THE STATE OF
ILLINOIS ex rel. JOHN S. RUSCH,
Defendant in Error,

v.

HARRY SCHWARTZ, TIMOTHY SULLIVAN
and DORA ROBIN,
Plaintiffs in Error.

9 / a
JUDGE TO COUNTY COURT,
COOK COUNTY.

25 C. 2. A. 624
MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The respondents, Robin, Schwartz and Sullivan, were the duly appointed election officials serving in the eighth precinct of the twentieth ward in the City of Chicago at a primary election held April 10, 1928. Schwartz and Sullivan acted as judges of the election and Mrs. Robin, as clerk. They were duly commissioned by the Board of Election Commissioners of the City of Chicago and by virtue of their respective commissions, were officers of the County Court of Cook County.

February 6, 1929, John S. Rusch, Chief Clerk of the Board of Election Commissioners, filed a petition setting up alleged misconduct and misbehavior on their part in their respective offices and praying that a rule might be entered upon them by the Judge of the County Court that each of them show cause why he or she should not be punished for contempt by that court.

They answered under oath denying the charges and thereafter moved that an order of dismissal be entered upon such sworn answer. The motion was denied. They moved for a trial by jury, which was also denied. A motion for their discharge on the ground that they were not officers of the County Court was likewise denied. Thereafter, they moved for a severance, but this motion was also denied.

The court heard the evidence offered by the respective

THE PEOPLE OF THE STATE OF
CALIFORNIA, COUNTY OF LOS ANGELES,
DO HEREBY CERTIFY THAT

THE FOLLOWING IS A TRUE AND
CORRECT COPY OF THE
ORIGINAL AS FILED

THIS DAY

1914

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the County of Los Angeles, California, this 1st day of January, 1914.

The undersigned, County Clerk of the County of Los Angeles, California, do hereby certify that the foregoing is a true and correct copy of the original as filed in the office of the County Clerk of the County of Los Angeles, California, on the 1st day of January, 1914, and that the same is a true and correct copy of the original as filed in the office of the County Clerk of the County of Los Angeles, California, on the 1st day of January, 1914, and that the same is a true and correct copy of the original as filed in the office of the County Clerk of the County of Los Angeles, California, on the 1st day of January, 1914.

WITNESS my hand and the seal of the County of Los Angeles, California, this 1st day of January, 1914.

County Clerk of the County of Los Angeles, California.
I, the undersigned, County Clerk of the County of Los Angeles, California, do hereby certify that the foregoing is a true and correct copy of the original as filed in the office of the County Clerk of the County of Los Angeles, California, on the 1st day of January, 1914, and that the same is a true and correct copy of the original as filed in the office of the County Clerk of the County of Los Angeles, California, on the 1st day of January, 1914, and that the same is a true and correct copy of the original as filed in the office of the County Clerk of the County of Los Angeles, California, on the 1st day of January, 1914.

They answered that under the laws of the State of California, the undersigned, County Clerk of the County of Los Angeles, California, do hereby certify that the foregoing is a true and correct copy of the original as filed in the office of the County Clerk of the County of Los Angeles, California, on the 1st day of January, 1914, and that the same is a true and correct copy of the original as filed in the office of the County Clerk of the County of Los Angeles, California, on the 1st day of January, 1914, and that the same is a true and correct copy of the original as filed in the office of the County Clerk of the County of Los Angeles, California, on the 1st day of January, 1914.

parties. They were represented by attorneys, and after a full hearing the court entered a finding that each of them was guilty, entered judgment thereon and sentenced each of them to confinement in the County jail for a term of one year. They seek to reverse these judgments by this writ of error.

It is urged that the court erred in denying the motion for a severance. This motion was not supported by an affidavit. The matter rested in the discretion of the court, subject, of course, to review for abuse. There was no showing that would require a severance. People v. Covita, 262 Ill. 614, is one of the many cases which might be cited.

The petition alleged that four overt acts had been committed by each of the respondents. There were findings of guilt as to three of these acts, but there was no finding as to the fourth. It is contended that the judgment imposes an aggregate sentence upon three overt acts as alleged and therefore that the failure to find evidence sustaining one of them requires a reversal of the judgment. It is said that it is well settled that an aggregate unit judgment upon several findings cannot stand if erroneous as to any one of them, citing Gompers v. Buck's Store & Bazaar Co., 231 U. S. 418; People v. Newmark, 312 Ill. 625; People v. Boyle, 312 Ill. 586, and Iron Moulders' Union v. Greenwald, 4 Ohio N. E. (N.E.) 161.

We do not regard these cases as applicable to the facts as disclosed in this statutory proceeding. The respondents were not punished for a particular act. They were not punished for any particular series of acts. Their punishment was inflicted for contempt of the County Court of which they were officers. Any one of the alleged acts may have been sufficient to constitute that offense. The ultimate question for decision was whether the evidence showed conduct with reference to their official duties which could reasonably be construed as amounting to contumacy and dis-

respect for the court of which they were officers. The question involved is their conduct in general at the time in question with reference to the performance of their official duties. There is a general finding of guilt as to each of them, and this is sufficient if proved beyond a reasonable doubt. It was so held in People v. Sylvester, 343 Ill. App. 689, a case involving a proceeding of the same general nature under this statute. In the opinion there, the second division of this court said:

"There were 15 different instances of persons recorded as having voted twice. But it is urged that Menet could not have known of them because the duplications occurred after his discharge. But granting this, the order of conviction against him would stand on the other findings. It is not necessary to the sustaining of the order that he be guilty of all the court's findings."

And in People ex rel. v. Burke, 247 Ill. App. 323, another case involving a similar proceeding under the same statute, the third division of this court said in substance that acts of misconduct of a judge of election at the polls when taken collectively, considered in the manner in which they were done, were sufficient to constitute a contempt of court, although the individual acts of themselves might not constitute a contempt. On the contrary, in the Gompers' case there was no general finding of guilt, as here, and the Boyle and Newmark cases involved proceedings essentially different; namely, whether an order of commitment for contempt in refusing to answer certain questions on the ground that the answers might incriminate the witness should be sustained. In the Iron Moulders' Union case the question seems to have been whether certain defendants could be held guilty upon a finding concerning a matter which was not stated in the written charge made against them.

It is also urged that the court erred in limiting the cross-examination of a witness named Robinson. In such cross-examination respondents offered to show that while living at 914

Maxwell street in March, 1927, the witness killed a man named Jim Broil and that the witness had so stated at a judicial hearing; that the witness committed the crime of murder and had not been prosecuted and no indictment returned against him. The record fails to show any definite ruling by the court upon this offer, although the indication was that the objection should be overruled, the court stating:

"All this witness testified to was that certain people did not reside at certain addresses. I do not know if the man killed somebody else what that has got to do with it."

The evidence indicated that Robinson had for more than a year been supported by the state; that he had been carried on the state's payroll and his rent paid by the state; that he and all his family were provided with food at the expense of the state. His general criminal career also was made to appear, and no doubt very much whether even proof of a charge of murder could have added anything to his discredit as a witness. Even if this evidence had been admitted, it would not in our opinion in any way tend to influence the finding of the trial court, as certainly it would not, the opinion of this court.

Complaint is also made in this connection that the court excluded evidence tending to show that an indictment had been secured against Vera Robin on a charge of kidnaping Robinson, but this evidence could not have any bearing upon the issues in this case and was properly excluded.

As to Schwartz and Sullivan, the evidence shows them to be guilty beyond a reasonable doubt. They were judges of election (this was established by their answers) and they were therefore officers of the court and responsible for the manner in which the election was conducted. The record discloses 23 names on the poll books of persons who voted without being registered. Each of the respondents testified in his or her own behalf. They do not deny,

except in a general way, that ballots were marked by the judges and clerks for many of the voters without taking the affidavits required by law, nor that voters, who were challenged and not registered, were allowed to vote notwithstanding challenge; that persons voted repeatedly under the same names. In other words, these judges, who under the law and under instructions were obligated to see that there was a fair and just election, conducted one that was lawless and fraudulent in almost every respect. They well deserve the the punishment inflicted. We do not hesitate to hold them guilty beyond a reasonable doubt.

In the case of Mrs. Robin, the record does not show such clear and convincing evidence. In her case the finding of the court is:

"That at and during said primary election in said precinct said defendant, Jara Robin, knowingly and wilfully permitted and allowed certain persons not then and there duly qualified and registered voters to vote, and then and there wilfully and knowingly recorded, tallied and counted said illegal votes; and knowingly and wilfully permitted and allowed certain persons not then and there duly qualified and registered voters to vote in the name of certain duly qualified and registered voters, and then and there wilfully and knowingly recorded, tallied, counted and made return of said votes illegally cast; and knowingly and wilfully permitted and allowed more than one vote to be cast in said precinct in the name of various duly qualified and registered voters, and then and there wilfully and knowingly recorded, tallied, counted, and made returns of said illegal votes."

The evidence shows that Mrs. Robin is a widow 34 years of age; that she left grammar school when in the fourth grade at the age of 12 years and went to work in a box factory; that she afterwards worked as a carton maker until the time of her marriage in 1914 and that she continued the same employment after her marriage. It is undisputed that she was entirely ignorant of the election laws and of her duties as a clerk of election thereunder. She had, however, been furnished with a copy of the law, and she had an opportunity therefore to inform herself as to her duties. Moreover, she must

under the well known rule (which of necessity lies at the base of any scientific system of jurisprudence) be presumed to have known the law and what her duties were thereunder. The judges of election, rather than she, were primarily responsible for the manner in which this election was conducted. We have carefully considered her testimony. She says that when she began the duties in question she did not know that there was any checking to be done, that later in the day she found out that the names of persons were supposed to be checked off as they came in, but she does not recollect who told her that or when it was called to her attention. She was not acquainted with the voters, most of whom were colored, and she says it was hard for her to distinguish between them. She testified in favor of Schwartz and Sullivan, and says that to her knowledge they did not misconduct or misbehave themselves on that day while acting as judges of election.

Her entire attitude makes it impossible to believe that she was innocent of an intention to participate in the fraud and disregard of law which made this election a farce. She should not be so severely condemned as the judges who were directly responsible, but there is abundant evidence that she is technically guilty and abundant evidence that she was not guiltless of intentional wrongdoing. She saw and took a part in it all, and she made no protest. Her punishment is perhaps severe, but fair and honest elections is the foundation upon which our government rests, and those who err in this respect deserve speedy and severe punishment.

The judgment is affirmed.

AFFIRMED.

McDurely, P. J., concurs;
Mr. Justice O'Connor took no part in this decision.

33745

RUTHERFORD & HARDING, Inc.,
a Corporation,

Appellant,

vs.

PAUL P. BRADL,

Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

I. The plaintiff corporation confessed judgment against defendant Bradl for the sum of \$10,307.48 on a promissory note. On defendant's motion supported by an affidavit the judgment was opened up and leave was given defendant to make a defence and the cause was put at issue. There have been two trials by jury and upon each trial there was a verdict for defendant, and on the last verdict, the court overruling motions of plaintiff for a new trial and in arrest, entered judgment for costs against plaintiff.

Plaintiff contends that the court erred in permitting defendant to introduce evidence tending to deny the execution of the note sued on, in its rulings upon the evidence, in entering judgment on the verdict, and in the giving and refusing of instructions. It is also urged that the court erred in denying a motion of plaintiff at the close of all the evidence for a directed verdict in plaintiff's favor.

II. The original affidavit of merits averred that the supposed signature of defendant to the note was a forgery, and in an affidavit (in gross) afterwards filed, it was averred by defendant "that he did not sign the said alleged note and warrant of attorney ***; that he never had any dealings with the plaintiff except as hereinafter set forth, and that the said alleged note or instrument upon which the judgment herein was confessed was made up and signed by someone other than this defendant as a part of the

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THE UNITED STATES OF AMERICA

1. The plaintiff complains that defendant
against defendant Brown for the sum of \$10,000.00 in a promissory
note, on defendant's notes numbered by the plaintiff in the
and signed by the plaintiff and defendant in the
the sum was not as stated. There have been two trials by jury
and upon each trial there was a verdict for defendant, and on the
first verdict, the court granted judgment of plaintiff for a sum
trial and in every other instance the court granted judgment
plaintiff contends that the court acted in granting
defendant in defendant's defense because it took the evidence to
the note and so, in the trial upon the evidence, in granting
judgment on the verdict, and in the trial, and judgment of the
evidence. It is also urged that the court acted in granting
evidence of plaintiff on the issue of the evidence in a libelous
verdict in plaintiff's favor.

2. The original complaint of plaintiff against defendant
supposed judgment of defendant in the trial was a verdict, and so
an affidavit (in great) defendant's trial, it was granted by the
Tribunal that he did not wish to be judged and so moved to
attorney and that he moved and was granted the same privilege and
copy of defendant's trial, and that the court and that the
Tribunal was that the defendant's trial was granted the same
it was granted to defendant that the defendant was a party of the

following transaction, to-wit:."

Thereafter by leave of court this affidavit of merits was amended upon its face so as to further state. "Nor did he authorize any other person to sign or execute said note or warrant of attorney in his behalf." By amendment the affidavit was further made to assert, "Some one other than the defendant fraudulently made out and signed the alleged note."

Plaintiff contends that this is not a sufficient denial of execution of the note under the provisions of section 52 of the Practice act (Smith-Hurd's Ill. Rev. Stat., chap. 110, sec. 52), which has been adopted, insofar as the same may be applicable and is not inconsistent with the Municipal Court act and amendments thereto by rule 22 of said court. Section 52 of the Practice act provides:

"No person shall be permitted to deny *** the execution** of any instrument in writing, ** upon which any action may have been brought, *** unless the person so denying the same shall, if defendant, verify his plea by affidavit; ***."

In support of this contention plaintiff cites Davis v. Cleghorn, 25 Ill. Ill., and Donnell v. McDonald, 37 Ill. App. 144.

In Davis v. Cleghorn, Cleghorn and others sued Amos Davis upon a note made by ^{Amos} Davis to the order of I. Davis and endorsed by him. Amos Davis filed a plea of actio non because he said that the note was not endorsed by the payee as supposed by the declaration, and this plea was verified by defendant's attorney, who affirmed "that the signature, 'I. Davis,' to the endorsement on the back of said note sued on in this cause, is not the handwriting of said I. Davis." Upon trial the note was offered in evidence and admitted over objection. There was a judgment for plaintiffs. The court held that the verification of the plea was insufficient to put plaintiffs upon proof of the assignment. The court held that the averment that the endorsement was not in the handwriting of the payee did not amount to an averment that the

endorsement was not his.

In Donnell v. McDonald, the plaintiff sued the defendant, Donnell, on a promissory note signed "E. P. Donnell Mfg. Co., E. P. Donnell, proprietor." The declaration averred that the defendant made the note by that name, style and description. The defendant filed the general issue and an affidavit stating that the note had been obtained by one Clark from the defendant's bookkeeper through fraud and misrepresentation, without consideration and without defendant's knowledge. The affidavit was held insufficient and the judgment against the defendant affirmed because the affidavit did not deny the agent's authority to execute the note and to deal with Clark.

Under the practice in the Municipal court an affidavit of merits seems to be substituted for both plea and affidavit, required by section 63 under the provisions of rule 13 of that court. Rule 15 provides:

"Every pleading shall contain a concise statement of the ultimate facts on which the party pleading relies for his claim or defense as the case may be, but not the evidence by which they are to be proved."

The whole tenor of the statute with reference to the organization of the municipal court and practice therein indicates an intention that the exactness and preciseness required in pleading at common law shall not obtain in that court. In the opinions in the cases cited, the exact averments of the declarations are not set up, and it is fair to assume that if the records were before us it would be found that the affidavits were not responsive to the material allegations of these declarations. Here, the statement of claim does not aver material matters with the preciseness required in a common law declaration, and it would seem reasonable to hold that defendant was not required to make any averment not necessarily responsive to the averments of the statement of claim.

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There is a possibility that the above information is not correct. The information is being provided for your information only. It is not intended to be used as a basis for any action. The information is being provided for your information only. It is not intended to be used as a basis for any action. The information is being provided for your information only. It is not intended to be used as a basis for any action.

The House of Representatives has passed a bill to amend the National Labor Relations Act, which would give the National Labor Relations Board the power to order the reinstatement of workers who have been fired for political reasons. The bill is part of a larger effort to strengthen labor rights and protect workers from unfair treatment by employers.

Plaintiff says that the affidavit is defective in that its allegations did not exclude the adoption by defendant of the signature subscribed to the note. There is no averment in the statement of claim by which defendant would have necessarily supposed that any such adoption was claimed to have been made by him, and there is not in the whole record a scintilla of evidence tending to show a basis for any claim that defendant adopted the signature of another. It would hardly seem that defendant would be obliged to negative every possible situation under which it might be claimed he should be held liable on the signature although it was not his. The statement of claim averred that he executed and delivered the note. It did not aver that some other person executed the note and that defendant adopted the signature as his own. It is difficult to understand on what theory defendant would be required to negative an averment not set up in the original pleading. Moreover, the affidavit as amended states not only that defendant did not sign the note; it affirmatively avers that some one other than defendant made it out and signed it and that this person was not authorized by defendant so to do. If we would assume that some person other than defendant signed the note and that defendant adopted the signature as his own, then the affidavit would be untrue in stating that defendant did not sign the note and would be untrue in stating that defendant did not authorize such person to sign, since an adoption of the signature would amount to an acceptance of the signature as that of defendant himself, as well as an acknowledgment of the authority of the person who signed the note.

Moreover, in this connection we think it cannot be held, as plaintiff contends, that the insertion of the word "fraudulently" is without any meaning, since the affidavit set up the facts which, it was averred, constituted the fraudulent conduct, namely, signing defendant's name by another without his authority.

Plaintiff further contends that the affidavit of merits

nowhere denies the delivery of the note and that in another part thereof it admits that the note was "made out and signed to represent a payment under the contract." Thereby, it is said, defendant impliedly admits a delivery of the note for that purpose, and it is argued that the fact of such implied delivery standing undenied constitutes an adoption of the note as the obligation of defendant. The argument is ingenious but without validity. If, as we have already said, defendant neither signed the note nor authorized another to do so for him, but on the contrary, his signature was affixed thereto by an unauthorized person for a fraudulent purpose (all of which is clearly set forth in the affidavit), it is difficult to understand upon what theory such a note (although it was made to represent a payment made under the contract) could be said to have been adopted as the note and obligation of defendant.

We conclude that under section 52 of the Practice act as adopted by the rules of the Municipal court, the court did not err in receiving evidence offered tending to show that defendant did not sign the note and that his name was signed by another without authority for a fraudulent purpose, and there being some evidence tending to establish these facts set up in the affidavit, the court did not, as plaintiff contends, err in refusing to direct a verdict in defendant's favor at the conclusion of all the evidence.

III. Plaintiff next contends that the court erred in permitting over its objection the introduction in evidence as standards of handwriting certain exhibits and in permitting the use of those standards of handwriting by certain lay and expert witnesses produced by defendant for the purpose of proving that the signature on the note was not that of defendant. This contention requires the interpretation of section 50 of chapter 51 of the Revised Statutes of Illinois, being an Act concerning proof of handwriting and to permit proof of handwriting to be made by comparison, approved June

1. The first question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

2. The second question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

3. The third question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

4. The fourth question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

5. The fifth question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

6. The sixth question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

7. The seventh question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

8. The eighth question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

9. The ninth question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

10. The tenth question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

23, 1915. Laws of 1915, p. 440. Section 1 of this statute provides:

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 "That all courts of this state it shall be lawful to prove handwriting by comparison made by the witness or jury with writing properly in the files or records of the case, admitted in evidence or treated as genuine or admitted to be genuine, by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the court."

Sections 2 and 3 provide that reasonable notice shall be given to the opposite party before a standard of writing is admitted in evidence and that upon motion duly made a reasonable opportunity shall be given to the opposite party to examine any such proposed standard. (Smith-Hurd's Ill. Rev. Stat. 1929, pp. 1467-8.)

A standard of handwriting was introduced in this case for the purpose of disproving that the note sued on was in defendant's handwriting, and plaintiff contends that while such standard of handwriting is admissible under the statute for the purpose of proving that a disputed document is in the handwriting of the party but that it is not admissible to disprove such fact. Plaintiff says that if it had been claimed by defendant that the signature to the note in question was in the handwriting of Mr. Harding, the president of plaintiff corporation, with whom defendant dealt, it would have been proper to produce standards of handwriting of Mr. Harding for the purpose of showing that the name, "Paul F. Brandl," was in Mr. Harding's handwriting, but that it was not admissible to receive in evidence standards of handwriting of defendant to prove that the signature was not in the handwriting of defendant. It is claimed that to give the statute an interpretation which would render admissible in evidence standards of handwriting of defendant to prove that the signature on the note in question was not his handwriting would be repugnant to the express language of the act and to the obvious intention of the legislature. Attention is called to the title of the act, in which it is described as one concerning and to permit "proof" of handwriting to be made by comparison, and to the

language in the body of the statute, which is that it shall be lawful to prove handwriting by comparison, and it is said that nowhere in the statute is there any language that can be reasonably said to permit the disproving of handwriting by comparison.

Attention is called to the condition of the law in this state on this subject as it existed prior to the adoption of the statute, as set forth in Stitzel v. Miller, 280 Ill. 92; People v. Clark, 301 Ill. 423. Plaintiff says that under the common law, even after the use of standards of handwriting by experts for the purpose of comparison became orthodox practice, the purpose to which such standards could be put was limited to proving, not disproving, that the handwriting on the disputed document belonged to the type of handwriting appearing on the standards; that where an extension of this common law limitation was desired statutes were enacted in the different states which declared the purpose of the extension; that in some of the statutes the language indicated that standards of handwriting might be used to prove or disprove such genuineness, while in other states the legislative enactment permitted the use of standards to prove "the genuineness or otherwise of the writings in dispute." A note appears to the brief, in which we are referred to the handwriting statutes, as enacted by the legislatures of the different states and countries, and plaintiff says that it is fair to assume that the legislature of this state knew of the existence of these statutes and omitted by design the words which would have affirmatively authorized the introduction of standards of handwriting to disprove the purported signature to a document. It is further urged that our legislature might well have been prompted to this omission through a desire not to sanction the use of self-serving standards of handwriting by a person charged with having executed a disputed document. The brief states that the writer has been unable to find any decision where either before or

after the adoption of this statute it was held that standards of handwriting could be used for the purpose of disproving the signature to a disputed document.

It is admitted that at all times standards of handwriting have been admissible for the purpose of comparison to show that a disputed handwriting was that of a particular person charged with having written it, and that in every case the purpose of introducing the standards was to place responsibility for the disputed signature upon the writer of the standards. It is said that at common law standards of handwriting are admissible in evidence to show affirmatively that the disputed handwriting is that of a particular person. 4 Wigmore on Evidence, 2nd ed., sec. 1991, pp. 234-235. In view of these facts, it is asserted that the manifest intention of the legislature was that the common law limitation should be retained and that the only purpose in adopting the statute was that standards of handwriting might be rendered competent and considered as proof establishing that the handwriting in dispute was the same as that appearing on the standards. As supporting this theory plaintiff cites Cook v. Hoecker, 317 Ill. App. 479, and Whinn v. Dettle, 222 Ill. App. 463.

It would unduly extend this opinion to discuss in detail these distinctions. It must be sufficient to say that a careful consideration of the cases cited discloses not only that they do not sustain plaintiff's contentions but that they affirmatively declare a contrary construction of the statute.

Cook v. Hoecker, *supra*, is a case where, as here, suit was brought upon a promissory note. Defendant, Amelia Hoecker, set up as her defense that she did not sign the note. The jury found for the plaintiff and judgment was entered thereon. Evidence of standards of handwriting for comparison was there admitted tending to disprove the genuineness of the note, and the court said that

that defendant, in attempting to prove that some other designated person forged the writing in question, had the right to have such comparisons made between the genuine writing of such other person and the writing in question; that it was axiomatic that if one is entitled to prove a fact he might prove it by competent means; that if one charged with being the author of a writing denied it, he had a right in support of that denial to prove that it had been executed by another, whether that other was a party to the pending suit or not, and that if it was lawful to prove handwriting by comparison, as declared in the act of 1915, "then it goes without saying that he should be entitled to prove by comparison whose writing it is. On principle, a person certainly should be entitled to exculpate himself from the charge of being the author of a writing by the same character of evidence that his responsibility for it may be established." The court further said:

"After a careful examination and consideration of the act in question and such authorities as have been cited, we are convinced that to limit its application to the writings of the party charged by the pleadings in the case on trial with having made the writing involved in the litigation, would be a misconstruction of the language of the act, a misinterpretation of the intent of the legislature in passing the act, and would establish an unjust rule of evidence whereby the liability of a man might be established by a class of evidence that would be unavailing to him in making his defense."

The court said that the act in question was a remedial law intended to aid in ascertaining the truth and that if it was competent to prove the genuineness of the writing by the act in question, the spuriousness of the same writing should be permitted to be established by the same means. After a review of numerous authorities, the court said:

"After a careful examination and consideration of all these authorities and the various statutes upon which they are based, we are convinced that the act of 1915 under consideration should be construed to mean that whenever it is competent to establish by proof that a given writing is that of a particular person, either writings of that person, the genuineness of which has been established to the satisfaction of the court, are admissible in evidence as standards of comparison."

[illegible]

"After a careful examination of the evidence, we are convinced that the defendant is not guilty of the crime charged. We therefore find him not guilty and acquit him of the same. We will now return the defendant to the custody of the sheriff."

The court said that the act in question was a violation of the act in question and that it was intended to aid in establishing the fact and that it was intended to give the government of the state by the act in question, the government of the state which should be established to be established by the state court, after a review of the act in question, the court said.

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It will be unnecessary to discuss in detail the facts in Shinn v. Seitle, also cited by plaintiff, (rather than to restate the conclusion there expressed by the court, namely:

"An examination of sections 7 and 8 of the foregoing statute leads us to the conclusion that the right to offer a proposed standard of writing is not limited to the party contending that the signature is genuine but that either party has the right to offer proposed standards."

IV. Plaintiff further contends that the court erred in permitting defendant's lay witnesses, Stassen, Bray and Miller, to testify concerning standards of handwriting. It is, of course, the well recognized rule that lay witnesses may not testify as to their opinions upon comparisons of standards of handwriting, but apparently plaintiff misunderstood the record here. These witnesses had seen defendant write; they had dealt with him in a business way, and in connection therewith they had seen papers and documents which purported to carry his signature. In other words, through experience they knew defendant's handwriting, and were competent to state whether the given signature was or was not that of defendant. They did not base their opinions on a comparison of handwritings in evidence by putting the same in juxtaposition. There are numerous well-considered authorities which hold that evidence of this kind is competent. Long v. Little, 119 Ill. 600; Riggs v. Powell, 142 Ill. 453; Hagle v. Schmidt, 239 Ill. 695; Kelly v. Fallon, 100 Ill. App. 108.

Moreover, plaintiff did not object to this evidence when offered in the trial court and is therefore not in a position to successfully urge the objection here. Cochran v. Robert Burgess & Son, 190 Ill. App. 479; Akers v. C. C. & St. L. Ry. Co., 201 Ill. App. 14; City of Chicago v. English, 193 Ill. 211.

V. Plaintiff further contends that the court erred in limiting the cross-examination of the expert witnesses for defendant,encie and Bounds. An examination of the record on this point discloses that plaintiff was permitted to cross examine

these witnesses at length upon every phase of their employment. It appeared that they were to be compensated for their services in preparing to testify, and that their employment by defendant was casual and not continuous. The court, however, sustained objections to questions tending to show what the exact amount of the compensation received was to be. Plaintiff contends that this is reversible error on the authority of Kerfoot v. City, 195 Ill. 329, and City of Chicago v. Van Schaack, 350 Ill. 264. All the cases hold that the extent of such cross examination is largely within the discretion of the court and that only an abuse of the discretion will constitute reversible error. The only limitation put upon the cross examination here referred to the exact amount of compensation. The court, we think, might well have permitted the witnesses to answer; nevertheless, we think the error, if error it was, in this respect is not reversible.

VI. Plaintiff further argues that since the suit here is based upon a promissory note, consideration for the execution of the note is presumed; that the burden of proof was upon defendant to show want or failure of consideration, and it is urged that there is no competent evidence in the record contradicting the presumption. A long line of authorities beginning with Richardson v. Richardson, 148 Ill. 563, and ending with Higgins v. Chicago Title & Trust Co., 312 Ill. 11, is cited to this proposition. There is no question about this general rule, but there would appear to be no reason for its application in a case where, as here, the affidavit of merits denied the execution and delivery of the note. Halladay v. Blair, 223 Ill. App. 609.

VII. The undisputed evidence shows that defendant signed a contract with plaintiff for the purchase of 30 acres of land in Cameron county, Texas. Plaintiff contended and gave evidence tending to show that the note was given as a part of this same

transaction. Defendant admitted signing a contract but gave evidence tending to show that there was an oral agreement that the contract should not go into effect or become binding unless and until it was approved by his wife, Mary C. Brandl. It is undisputed that Mary C. Brandl never signed the contract and that when informed thereof she refused her assent thereto in her own behalf and refused her assent to the proposal that her husband become a party thereto. Her name appears as a party in the body of the contract which is in evidence, but her signature is not attached. Plaintiff, however, contends on the authority of Brelling v. Nybl, 187 Ill. App. 165, that notwithstanding her failure to sign or assent, defendant is nevertheless bound. Heckmann v. Detlaff, 263 Ill. 303, is also cited, while defendant cites to the contrary Griesen v. Hubbard, 112 Ill. App. 16, and Beall v. Jones, 211 Ill. App. 336. We think these cases are not in conflict, the controlling question in each being whether it was the intention of the parties to the instrument to be bound jointly or severally. In this case there was evidence given in support of each contention, and the verdict of the jury must be regarded as conclusive.

VIII. Plaintiff also urges as applicable here the rule that where an agreement is reduced to writing, the writing affords the only evidence of its terms and conditions; that all antecedent and contemporaneous verbal agreements are merged therein, and that parol evidence is inadmissible to vary its terms. Here, again, a long line of authorities is cited, beginning with Lape v. Sharpe, 4 Ill. 566, and ending with Stirling Midland C. Coal Co. v. Coal Co., 334 Ill. 281, while Appellate court authorities including People v. Griesbach, 137 Ill. App. 462, and Harmony Cafeteria Co. v. Int. S. Co., 249 Ill. App. 532, are also cited. It would be a tedious task to review at length all these authorities, and it will be sufficient to say that one well-defined exception to this undoubted

transmission. Defendant admitted signing a contract and that the
 same leading to that fact there was no such agreement that the
 contract should not be held subject to future change of mind and
 would it was suggested by his wife, Mary J. Smith. It is understood
 that Mary J. Smith never signed the contract and that when defendant
 showed the contract to some friends in the New Orleans area, they
 her reason for the agreement was not soundly based on legal rights.
 Her name appears as a party to the contract and it
 is evidence, but not evidence in the contract. It is understood, however,
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VIII. Plaintiff also seeks an injunction that the
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general rule is that parol evidence is admissible to show that a contemporaneous written agreement never had a legal existence or binding force. Consistent with that rule it is permissible to show by parol evidence that a written agreement was never delivered as a binding contract. A few of the many cases that might be cited are Jordan v. Davis, 108 Ill. 336; Eiloria v. Orrell, 363 Ill. 531; Bell v. McDonald, 308 Ill. 329; Northwest Cannel. Milling Co. v. Sloan, 232 Ill. App. 266, and Wronski v. Wronskowski, 280 Ill. App. 529.

IX. Plaintiff next contends that there is a material variance between defendant's affidavit of merits and the evidence introduced thereunder and that the court erred in refusing to strike certain testimony of defendant on the ground of such variance.

The affidavit of merits in substance states that plaintiff represented to defendant that the proposed contract to be executed by him would not be binding until the same should be approved and signed by defendant's wife. Plaintiff contends that the testimony given by defendant on the trial to the effect that after the contract had been signed by him he took it to Mr. Harding, plaintiff's president, who wrote on the back thereof, in substance, that if Mrs. Brandl did not approve of the contract it should be cancelled, should have been stricken as it was inconsistent with the affidavit. It is said that the affidavit of merits sets up an oral agreement alleged to have been entered into at the time of or prior to the making of the alleged contract as an inducement for Brandl to sign the same, while the endorsement on the contract was made subsequent to the signing of the same and was in writing. Plaintiff cites Bugbey Adams v. Handel Bros., 333 Ill. 360, and a long line of authorities, most or all of which consider cases in tort rather than contract. The testimony of defendant was not definite as to the writing upon the back of the copy of the contract given to defendant. The testimony of defendant tended to show that it had been returned to plaintiff two years before the

trial and that plaintiff was served with notice to produce this copy of the contract, which it did not do. Defendant testified to the effect that the writing was: "If Mrs. Brandl does not approve of this contract it shall be cancelled, or something like that, I just can't remember." It is elementary that a variance must consist of a substantial departure from the issue in the evidence adduced and must be in some matter which in point of law is essential. The mere fact, if it is a fact, that defendant proved more than his affidavit alleged is not a variance. Kinsley v. Intl. Military Equipment Co., 41 Ill. App. 289; Burdock v. Talbot, 43 Ill. App. 590.

X. It is further urged that the court erred in modifying plaintiff's instructions Nos. 3 and 4. In instruction No. 3, as submitted by plaintiff, the court told the jury that if it was believed that the contract signed for the purchase of Texas lands was altered or changed in any material respects after the signing thereof, and such alteration was made with the knowledge and consent of defendant and in his presence and that thereafter there was delivered to defendant a copy of the contract signed by plaintiff and also signed by defendant, then such contract in respect to such alterations and changes was not false and fraudulent and was not by concealment.

By instruction No. 4, as requested by plaintiff, the jury were instructed that if at the time of signing the contract the same was not completely filled out but that subsequently thereto it was filled out with the knowledge and in the presence of defendant and that thereafter defendant took with him a signed copy of said contract so filled out, then such contract had the same legal force and effect as it would have had under the facts and circumstances offered in evidence as if it had been fully filled out prior to the signing thereof.

The court modified each of these instructions by adding to the conditions named therein the clause, "and without objection on his part," and this is the alleged error of which plaintiff complains. The argument of defendant that in giving these instructions the court erred against defendant because the same directed the attention of the jury only to facts favorable to plaintiff and left out the facts tending to show defendant's theory of the case, is not without force. Jager v. Julius Meisler & Co., 216 Ill. App. 39; Black v. Harris, 200 Ill. 96. However, the modification did not in any way affect the substance of the charge, and it is difficult to see how it could have influenced an intelligent jury either one way or the other. There is no merit in the contention that the modification of these instructions was error. Maul v. People, 198 Ill. 259; Reisch v. People, 229 Ill. 574.

XIII. Plaintiff also argues that the court erred in giving defendant's instruction No. 13. That instruction is as follows:

"The court instructs the jury that the issues you were sworn to try in this case are as follows:

Did the defendant, Paul P. Brandl, sign the alleged note in evidence as Plaintiff's Exhibit 3.

Was the alleged contract in evidence as Plaintiff's Exhibits 1 and 1-a signed and delivered to the plaintiff by the defendant, Paul P. Brandl, under an agreement that it was not to become binding unless his wife, Mary C. Brandl, also signed it.

If you conclude that the greater weight of the evidence does not show that the defendant, Paul P. Brandl, signed the alleged note in evidence, then you need not concern yourselves with the other issue, because in no event can the plaintiff be entitled to recover unless it has been shown by a preponderance or greater weight of the evidence that the alleged note bears the genuine signature of Paul P. Brandl.

If you find from the greater weight of the evidence that the defendant, Paul P. Brandl, did sign the alleged note before you, then you will examine the evidence bearing upon the issue whether the alleged contract was delivered by the defendant to the plaintiff under agreement that it was not to become binding unless his wife, Mary C. Brandl, also signed it, and if you find from the evidence and under the instructions of the court on this issue in the affirmative you will find the defendant not guilty."

Plaintiff says that there is no competent evidence in the record upon which the court could submit this instruction to the jury. He again argues the matter already considered, namely,

that the testimony of defendant as to the writing on the copy of the alleged contract is inconsistent with the allegations of his affidavit of merits. Plaintiff says, in substance, that while there is evidence tending to show that the contract would be cancelled if not approved by Mrs. Brandl, there is no evidence that the agreement was not to be binding unless signed by her. This statement does not correctly represent this record. Defendant testified that Harding, representing plaintiff, said: "If you will sign this contract, why, I can hold it for you. It won't obligate you in any way. If on your return home your wife does not approve of this contract and does not sign it, why, I will gladly cancel the contract," and that defendant replied: "Now, remember, if I sign this contract that it will be subject to my wife's agreement, that if she doesn't approve of it there will be no contract." Moreover, as already pointed out, defendant stated that he could not give the exact words of the writing placed upon the copy of the contract, and the record shows that this copy, which was in the possession of plaintiff, was not produced. Each of the parties was justly entitled to instructions which would fairly submit his theory of the case to the jury, provided there was any evidence tending to sustain the theory, and the court did not err in giving this instruction at the request of defendant.

Apparently desiring to omit no possible suggestion, plaintiff contends that the court erred in denying its action for a directed verdict in its favor at the close of all the evidence. In view of what has already been said, it would seem unnecessary to discuss this point. We have already stated that there were issues of fact for the jury. The record discloses that these issues have twice been submitted to a jury and that the verdicts have been for the defendant. A careful consideration of the whole record leaves us without doubt that another trial by another jury would

result in a similar verdict. This court has held in City of Chicago v. McWally, 128 Ill. App. 375, that where two juries have passed upon a case and have found the same way, an error to reverse must be clear and palpable. There is no such error in this record, and substantial justice has been attained.

Defendant has assigned cross-errors, alleging that the contract involved in this suit was ultra vires the plaintiff corporation and therefore void. The argument is not without force, but in view of the conclusion at which we have arrived upon other points, it will be unnecessary to give this one consideration.

The judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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33802

VINCENT SZYMANSKI,
Appellant,

vs.

SHERMAN STATE BANK,
a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

33802

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff Szymanski appeals from a judgment in favor of defendant entered upon the verdict of a jury.

Plaintiff's statement of claim was for \$4700 said to be due on account of a loan made to defendant on June 18, 1924, which was to be repaid in one year with interest at 5½% payable semi-annually.

The consolidated common counts were attached, and an affidavit of plaintiff's claim stated that the suit was for the recovery of money only and that the nature of plaintiff's demand "is for money advanced, paid and loaned to the defendant, which it agreed to repay with interest thereon at the rate of five and one-half per cent per annum, as above set forth; that there was due to plaintiff from defendant, after allowing the defendant all its just credits, deductions and set-offs, the sum of \$4700, together with interest thereon at five and one-half per cent per annum from December 18, 1924."

The affidavit of merits denied that defendant on or about June 18, 1924, or at any other time, was indebted to plaintiff for \$4700 or any sum of money, and denied that on that or any other date defendant promised to pay said sum of money with interest as alleged.

Plaintiff argues that the verdict is contrary to the weight of the evidence; that evidence was improperly received; that the conduct of the court on the trial was highly prejudicial to

plaintiff, and that the court erred in instructing the jury.

On the contrary, defendant contends that a motion for an instructed verdict in its favor at the close of all the evidence should have been granted, because, in the first place, it appeared from the evidence that the fund, concerning which plaintiff sues, did not belong to plaintiff alone but to plaintiff and his wife jointly, and because, in the second place, there was no evidence showing that Bruno F. Kowalewski, the president of defendant bank at the time in question, had authority to borrow money in behalf of the bank. To this last contention, a single authority (Merchants' National Bank of Peoria v. Nichols & Edward Co., 223 Ill. 41) is cited.

As to the first point, the evidence shows without contradiction that plaintiff and his wife, Agnieszka Szymanski, sold their home for \$4,700 and deposited the same in their names in the Depositors State Bank, and that this amount was drawn out by a draft upon that bank signed by plaintiff alone, which directed the withdrawal to be charged to the savings account of Vincent or Agnieszka Szymanski. As the money was received from plaintiff alone, defendant cannot successfully interpose the defense of non-joinder.

As to the second point, we think the case cited is not applicable to facts such as here appear. That was a case where a manufacturer's agent assumed without authority the power to issue negotiable paper in the name of his principal, and the court held that persons dealing with such agents did so at their peril. The case is one often cited where it is not applicable, and it has been distinguished by this court in Hodges v. Bankers Surety Co., 152 Ill. App. 372; Edwards & Deutsch L. Co. v. Milderich P. Co., 221 Ill. App. 61; and Wiley v. Wolfe Steffelin & Co., 232 Ill. App. 333. The distinction between the power necessarily implied from an agency for a

manufacturing corporation to sell its product and the power of the president of a bank would seem to be clear. The evidence of Tomkiewicz, vice-president of the bank at the time of this transaction and a witness produced by defendant, shows that Bruno Kowaleski ceased to be a director and president of defendant in January, 1935; that prior to that time Bruno Kowaleski was in charge of the bank, and that he, the witness, was active in his absence. The uncontradicted evidence therefore shows that Bruno Kowaleski was the general agent of defendant and that, in the absence of express knowledge on his part to the contrary, plaintiff was not bound by limitations upon the president's authority insofar as the business of the bank was concerned. Weit v. Smith, 92 Ill. 385; Ward v. Johnson, 95 Ill. 315; Union M. L. I. Co. v. White, 106 Ill. 67; Merchants Bank v. State Bank, 10 Wallace (U.S.) 604; Bank of Minneapolis v. Griffen, 168 Ill. 314; Sherman State Bank v. Smith, 330 Ill. 373; Hanover Coal Co. v. Pullen, 137 Ill. App. 559, are a few of the many cases which might be cited to this point. It follows that the court did not err in refusing to give the instruction requested by defendant, and that upon the issues of fact raised by the pleadings, defendant was entitled to have the same fairly submitted to a jury.

The facts in evidence tend to show that the business of the defendant bank was begun by Bruno Kowaleski and Roman Kowaleski brothers, as copartners; that the business was later incorporated under the name of the Sherman Park State Bank, and that the name was afterwards changed to the Sherman State Bank. The business was conducted at Fifty-first and Dearborn streets, Chicago. Bruno Kowaleski was president and Roman Kowaleski cashier of the defendant bank. A building and loan corporation occupied a part of the same premises.

Plaintiff had known Bruno Kowaleski for about 16 years.

He had lived in this country about 18 years but never attended school, and he had always worked with Polish laborers. Although he could talk a little English he could not read it understandingly. His evidence was in part given by an interpreter. At the time of the trial he was about 45 years of age and, as already stated, married. He owned a home, which was sold for \$4700 and the proceeds placed in the savings department of the Depositors State Bank. As he wished to obtain a higher rate of interest than the 3 per cent which that bank paid, he says he visited the place of business of the building and loan association to that end but the secretary of the association was not in. He opened negotiations with Bruno Kowaleski at the bank's place of business, which transaction is the basis of plaintiff's suit.

Plaintiff's testimony tends to show a loan by him to the bank of \$4700 at 5 $\frac{1}{2}$ per cent interest. Defendant contends and its evidence tends to show, that the transaction was in fact a personal loan to Bruno Kowaleski in which the bank was not involved. Evidence tending to sustain defendant's contention is the unquestioned fact that the personal note of Bruno Kowaleski was delivered to plaintiff for the money; that one payment of interest thereon was made to plaintiff by the personal check of Bruno Kowaleski, and that after the death of Bruno by his own hand, plaintiff (who, however, acted upon the advice of an attorney obtained through the defendant bank) filed a personal claim in the name of his wife and himself against the estate of Bruno Kowaleski.

Although Bruno Kowaleski's version of this affair is unknown, the written documents in evidence show without contradiction that on June 18, 1934, plaintiff made a draft on his savings account payable to the order of the defendant bank for the sum of \$4700 and that this draft was drawn up at defendant's place of business. At that time this draft and plaintiff's savings account pass-

He had lived in this country about 15 years and never returned
abroad, and he had always carried with him his passport. Although
he would talk a little English, he would not speak it fluently.
The evidence was in part given by an interpreter. At the
time of the trial he was about 35 years of age, of average
stature, married. He owned a house, which was sold for \$1000 and
the proceeds placed in his savings account at the Industrial
State Bank. He was known to several Chicago men of Italian and
The U. S. was aware that such a man, he says he visited the place
of business of the building and loan association in New York
The secretary of the association was not in. He never recalled
seeing this man associated with the bank's affairs of business, or any
connection in the bank or association with

His highest regard is shown, that the investigation was in fact a

Examinee's name is [redacted] and the date of birth is [redacted].

On the 1st of March 1944, the following was received from the Ministry of the Interior, Berlin:

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive group.

book were delivered by plaintiff to Roman Kowaleski, then defendant's cashier and director, whose authority to act is not questioned; Roman endorsed the draft in the name of defendant bank and collected the money by accepting from the Depositors State Bank another draft for the full amount payable to defendant's order, which draft Roman Kowaleski endorsed and deposited to the credit of defendant with the Peoples Stock Yards State Bank. Thus the money for this draft was collected by the cashier of defendant and delivered to one of the tellers of defendant. After the receipt of the money the amount thereof was credited to the account of Bruno Kowaleski, whose account with defendant was then overdrawn in a large amount.

Roman Kowaleski was apparently reluctantly called by plaintiff in order to prove the endorsements made by him, and the attorney for plaintiff limited his examination of the witness to those particular matters. The court, however, undertook the cross-examination of the witness and over the objection of plaintiff's attorney brought out evidence of alleged conversations between witness and plaintiff and between Bruno Kowaleski and plaintiff tending to show that the transaction amounted to a personal loan to Bruno Kowaleski and that the transaction was with him personally and not with the bank. Plaintiff complains (justly, we think) of this action by the court as quite prejudicial to plaintiff's cause. The cross-examination should have been limited to matters gone into on the direct examination. In the course of the examination of Roman Kowaleski, the court interrogated the witness as follows:

"The Court: What is there about this transaction that convinced you that this money did not go to the bank? Was this a personal loan? Was this money taken up by your brother?"

A. Yes.

Q. Do you know that? A. Yes.

Q. And the bank did not receive any benefit? A. No, sir.

Q. Will you explain to the court and jury just what you know about it?

Mr. Edward: Before that I had just one question to ask.
 Q. Do you know to whose account personally that went?
 Mr. Newman: I object to that question.
 The Court: If he knows he may answer yes or no.
 A. I do.
 Mr. Edward: To whose account did that \$4700 go?
 A. To Bruno Kowaleski.
 Mr. Newman: I object to that and move the answer be stricken.
 The Court: Overruled.^a

Again, in the course of the examination of defendant's witness, Tomkiewicz, with reference to the disposition of the money obtained from the savings account of plaintiff, the court said, after cross examining the witness at length:

"Let the record show that the witness testified that there was no record of it in the bank, and that the bank never had the use of it. The deposit shows it was deposited in the name of Bruno Kowaleski."

The right of trial by jury amounts to little where the court manifests an interest and indicates that his sympathies are with one of the parties. Dunn v. Papale, 172 Ill. 522; People v. Lurie, 276 Ill. 630; Farbridge v. Cutler, 104 Ill. App. 39. The defendant was represented by able counsel which made it unnecessary for the court to assist in the trial of the case.

Complaint is also made as to the ruling of the court on the admission of evidence, and this assignment of error must also we think, be sustained, in that the court over objection received evidence of several witnesses to the effect that there was a custom in Chicago that presidents of banks were not given power to borrow money in behalf of the banks. This evidence was received without laying any proper foundation by showing that the practice was uniform, long established, generally acquiesced in, and so well known as to induce the belief that the parties contracted with reference to it. Turner v. Denson, 80 Ill. 65; Papin v. Goodrich, 103 Ill. 36; Packer v. Pentecost, 50 Ill. App. 223.

Complaint is also made that the court erred in the

giving of instructions at the request of defendant. In particular complaint is made of instruction No. 3, by which the court instructed the jury as follows:

"The court further instructs the jury as a matter of law that the mere fact that the plaintiff paid the sum of \$4700 to E. F. Kowaleski, if the jury believes from the evidence that the plaintiff did so pay it, and E. F. Kowaleski was acting as president of the Sherman Park State Bank, and if the jury believe from the evidence that he was so acting, does not obligate said bank to repay said sum to said plaintiff unless the jury further believe from the evidence that the said E. F. Kowaleski at the time of receiving said money was acting on behalf of said bank and within the scope of his apparent authority as president of said bank; and if the jury believe that said E. F. Kowaleski in receiving said money was not acting within the scope of his apparent authority as president of the bank, but in receiving such money was acting in his personal, individual capacity, then the bank is not liable and plaintiff cannot recover."

Complaint is also made of instruction No. 7, which is as follows:

"The court further instructs the jury as a matter of law that before the plaintiff can recover in this case, he must prove the following three things by preponderance of greater weight of the evidence: first, that E. F. Kowaleski then and there represented to the plaintiff that he was borrowing said money on behalf of the Sherman Park State Bank; second, that plaintiff gave the money to E. F. Kowaleski, believing that he was loaning it not to E. F. Kowaleski, but to the Sherman Park State Bank the defendant; and third, that E. F. Kowaleski then and there had authority from the said Sherman Park State Bank to borrow money on its behalf. If the plaintiff fails to prove any one of said three things by a preponderance of the evidence, the jury shall find the issues for the defendant."

One of the precise points in issue between plaintiff and defendant was whether this money was given to Bruno Kowaleski or to defendant bank, and it will be noticed in both these instructions the court assumed and instructed the jury that the money was given to Bruno Kowaleski. These instructions were objectionable for this reason and for the further reason that while they directed a verdict they entirely ignored one of the theories upon which plaintiff based his right to recover, namely, that defendant is liable for money had and received. Sullivan v. Eddy, 164 Ill. 391; Downey v. Palmer, 287 Ill. 42. A peremptory instruction is

improper which ignores any theory of the case upon which a plaintiff might recover. Altan Light Co. v. Oliver, 217 Ill. 35; Lloyd v. Matthews, 119 Ill. App. 546; Sesiganya v. Wilbur Lecher Co., 251 Ill. App. 364.

There are many other errors assigned and argued which we deem unnecessary to discuss at length. Those already pointed out are so serious as to require a reversal of the judgment.

The judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, F. J., and O'Connor, J., concur.

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For the first time, the authors have been able to compare the results of the two studies. The results of the two studies are very similar, which is a good indication that the results are reliable.

[illegible]

33824

FRANK KAFKA and FRANCES KAFKA,
Appellees,

vs.

SARAH B. PETERSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 I.A. 625

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued to recover a balance alleged to be due on account of a deposit of \$5,000 made with defendant under the terms of a certain lease executed May 28, 1924. The lease demised certain apartments known as Nos. 1634-1636 Loomis avenue and Nos. 1647-1649 Leland avenue, Chicago, for a term of ten years beginning June 1, 1924, and ending May 31, 1934. From June 1, 1924, until September 30, 1924, the rent reserved was \$900 per month and from September 30, 1924, until the end of the lease \$1,000 per month.

Plaintiffs defaulted in the payment of the rent. April 21, 1928, defendant filed a complaint in forcible detainer against plaintiffs and on May 16, 1928, recovered judgment for possession. May 31, 1928, a writ of restitution issued on the judgment and plaintiffs on that date surrendered possession of the premises, with the exception of certain parts thereof occupied by subtenants, the terms of whose occupancy are in dispute.

Plaintiffs claim \$5,000 with interest from the date of deposit at five per cent per annum, less \$2800 they admit was due for rent of the demised premises at the time of the surrender of the same on May 31, 1928.

Defendant filed an affidavit of merits asserting her right to retain all of the deposit in satisfaction of her damages on account of the violation of certain covenants in the lease by plaintiffs. She averred that under a paragraph of the lease she

was entitled to \$50 per day from May 18, 1928, until the restoration of the premises; that plaintiffs committed waste while in possession to her damage in the amount of \$600 by converting to their own use two gas ranges and two refrigerators belonging to defendant in the value of \$100 and by removing thirteen washbasins and other plumbing and plumbing equipment which cost \$900 to replace; that at the request of plaintiffs she allowed them to pay rent at the rate of \$900 per month for the months of November and December, 1927, and January and February, 1928, instead of \$1,000 per month as provided by the lease, and that the agreement to make such allowance was without consideration and void; that plaintiffs were indebted to her in the sum of \$400 for unpaid rent for these months; that plaintiffs had paid no rent whatever for March, April and May, 1928, and were indebted to defendant for \$3,000 for the unpaid rent for said months; that they paid no rent which accrued after May, 1928, and were indebted for rent for said period and until they restored defendant to possession, at the rate of \$50 per day.

Defendant admitted that plaintiffs made demand on or about June 4, 1928, for the payment of \$3206.75, which she refused to pay.

The cause was tried by the court and there was a finding against defendant with damages assessed at \$5437. Thereafter, on March 8, 1928, plaintiffs remitted \$361.62, and the court entered a final judgment against defendant for \$3075.35. The court entered particular findings as to the different items claimed by the parties. The errors assigned and argued relate to these findings.

The court found that plaintiffs were entitled to recover interest upon the deposit of \$5,000 from May 22, 1924, and it is urged that this finding is erroneous.

[illegible][illegible]

1941.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends Service Committee in the Philippines.

The agreement with reference to this deposit is covered by the 15th clause of the lease in evidence, which provides that the lessees agree to deposit with the lessor, "as security for the faithful performance of the covenants and agreements of this lease," \$5,000 concurrently with the signing of the lease, it being agreed that if the lessees paid all the rent as it became due by the terms of the lease and performed all the covenants therein contained and should keep the building in good condition and repair as therein provided and deliver same at the end of the term in good condition and repair, the lessor "agrees to apply the amount so deposited in payment of the last five-twelfths (5/12) of the last year's rent," but that in the event of the default of the covenants in the lease, or any of them, the lessor should have the right to cancel the lease, notwithstanding the deposit of security, and "may retain any unpaid balance that may be due for rent under the terms of this lease, and it is especially agreed by and between the parties hereto that the said sum of Five Thousand (\$5000.00) Dollars, shall upon cancellation of this lease for default in any of its covenants, be applied by the said Lessor in satisfaction of her damages by reason of such default, it being mutually understood and agreed by all the parties hereto that the said sum so deposited is and shall be her liquidated damages and not a penalty."

This provision of the lease is contained in a rider attached thereto. It contains no provision requiring the payment of interest, and the general rule seems to be that in the absence of an agreement to that effect a defendant cannot be charged with interest on money so deposited. Johnson v. Engelstein, 236 Ill. App. 215; In Re Cranwell's Estate, 160 N. Y. Supp. 204; 36 Corpus Juris 284, par. 1074.

It was stipulated on the hearing that the deposit was paid by plaintiffs to Whiteside and Westworth, the agents of de-

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defendant in the transaction, at the request of defendant and that the payment was made by a cashier's check to the order of Frank Kafka and endorsed by him. The check was deposited by Whiteside and Wentworth in their account in the Chicago Trust Company and was retained by them in payment of their commissions. Plaintiffs argue that this amounted to a conversion of the fund by defendant and that plaintiffs are entitled to recover interest upon that theory, citing Rosenbaum Bros. & Co. v. Brumm Comm. Co., 176 Ill. App. 305, and other cases announcing the rule there stated.

The argument of plaintiffs is based upon the theory that they were entitled to have the deposit kept as a separate fund, but the obvious answer to that argument is that the agreement did not so provide. Moreover, it appears that the check in question was turned over to the agents of defendant with the consent of Frank Kafka, the maker, and, as defendant points out, the statement of claim nowhere avers a tortious conversion and that issue was not raised by the pleadings. We think the court erred in allowing interest upon the deposit.

Defendant contends that she is entitled to an allowance of \$400 on account of a rebate of \$100 per month allowed to plaintiffs on their rent for the months of November and December, 1927, and January and February, 1928. The evidence shows that Whiteside and Wentworth, defendant's agents, wrote plaintiffs as follows:

"Chicago, November 2nd, 1927.

Mr. Frank Kafka,

1047 Leland Ave., Chicago, Illinois.

Dear Sir: We are authorized by the owners of your building to rebate your rent one hundred dollars (\$100.00) per month for the months of November and December, 1927, and also for the months of January, February, March and April, 1928.

The indications now are that by May 1 next, conditions will have improved very materially, so much so, in fact, that thereafter you should have no difficulty whatever in living up to the terms of your lease."

The evidence also shows that thereafter during these four months, defendant's agents billed plaintiffs for the rent at \$1,000 per month with a rebate of \$100, leaving a balance of \$900, for which they gave receipts as paid. Defendant argues that this reduction was without consideration; that the whole agreement was not executed; that the agreement was a unity and that since it was executed only in part by plaintiffs, defendant is entitled to a return of the \$400 heretofore allowed. Defendant cites to this point Ostremier v. Basil, 161 Ill. 330, and other cases stating the rule there announced.

She concedes that an agreement to make a gift, such as this, when fully executed is binding and that the law will not undo it, but urges that in cases where the agreement is not executed or executed only in part, the law will treat it as void in toto; that the agreement here was for six months, but that since plaintiffs failed to pay any rent for March or April, they are not entitled to retain the amount already received by way of rebate; in other words, that the promised gift was a unity, and not having been completed, was not binding on defendant. If it were conceded that the gift made by defendant was a unity, there would be merit to this contention, but the evidence here discloses, we think, not a gift as a unity but a gift of separate and distinct items each month, and when the same were paid and accepted we think the gift was in each case complete and irrevocable. For that reason we think this claim cannot be allowed.

Defendant also contends that she is entitled to retain from the deposit an item of \$475.00 which was expended necessarily by defendant in repairing the plumbing and replacing certain wash-bowls which were removed from the premises by plaintiffs after the expiration of their tenancy. The 11th clause of the written lease provided that the lessees should have the privilege of making such

improvements, repairs and alterations as might be necessary to make the demised premises suitable for hotel or rooming house purposes; that the same should be done in a workmanlike manner and entirely at the expense of the lessees and should comply with the laws and ordinances and that the plans and specifications should be first submitted to the lessor for her approval. The washbowls were installed at a cost of \$846.12 and replaced by defendant for the amount now claimed by her. They were sold by plaintiffs at an auction held on the day they vacated the premises. The fact that it was deemed necessary to secure the permission of the landlord to install these bowls would seem to indicate that it was the intention that they should become a part of the building, and it is difficult to understand why, if it was the intention of the parties that the tenant should have the right to remove them, the lease did not so provide. Plaintiff Frank Kafka testified to the effect that at the time these bowls were put in there was no plumbing to connect them with, but that plaintiffs had the plumbing put in; that when they were taken away he and the people who bought them disconnected them and left all the plumbing with which they were connected.

Even if it is conceded that these fixtures were removable, section 35 of the Landlord and Tenant act (Smith-Murd's Ill. Rev. Stat., chap. 65, p. 1796) would seem to require the removal thereof during the term of the lease. We think, however, that the bowls thus attached to the premises by the tenants became a part thereof and that defendant is entitled to credit for this item.

Defendant also makes claim for an allowance of \$28.20 for repairing leaks in waste pipes, but an examination of the record discloses that the evidence as to the amount of this bill was objected to by plaintiffs and the objection was sustained by the court, and apparently the attorney for defendant acquiesced in this

[illegible][illegible]

ruling. The item will therefore be disallowed.

Defendant also claims the right to retain the sum of \$57.35 expended by her after plaintiffs removed from the building in repairing certain plastering and also \$220 expended in repairing the back porches on the premises.

Under the 2nd and 10th clauses of the lease, the lessees covenanted that they had received the premises in good condition and would so maintain them; that upon the termination of the lease in any way they would yield up the premises to the lessor in good condition and repair, loss by fire and ordinary wear excepted; that the lessor should not be obliged to incur any expenses whatever for repairs or any improvements, but that the lessees at their own expense would keep all improvements in good condition.

The evidence with reference to these two items is conflicting. The court specifically found against defendant on them, and we are not constrained to hold that the finding is against the manifest weight of the evidence.

The larger item in controversy between the parties arises, however, from the contention of defendant that under the provisions of the lease she is entitled to damages of \$50 per day from April 3, 1928, the date upon which judgment for possession was entered, until May 31, 1928, at which time plaintiffs removed from the premises. She claims on this account \$2,900.

Plaintiffs concede that a rental of \$1,000 per month is due for March, April and May, 1928, but defendant contends that after the termination of the lease, which the parties seem to agree was on April 3, 1928, as stated in the notice of defendant, plaintiffs were liable under the 9th clause of the lease. By this clause the lessees agreed:

"At the termination of this lease, by lapse of time or otherwise to yield up immediate possession to said party of the first part, and failing to do so to pay as liquidated damages for

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the whole time said possession is withheld the sum of \$50.00 per day; but the provisions of this clause shall not be held as a waiver by said party of the first part or any right of re-entry as hereinafter set forth; nor shall the receipt of said rent or any part thereof or any other act in affirmance of the tenancy operate as a waiver of the right to forfeit this lease or the term hereby granted for the term still unexpired for any breach of any of the covenants sued on."

Defendant cites Farley v. Knight Light Soda Mountain Co., 225 Ill. App. 317, and Fassera v. Magner, 140 Ill. 197, in support of this contention.

The record here is devoid of any proof of damages through the withholding of possession other than for the use and occupation of the premises. The evidence does not disclose such wrongful holding over as appears in the cases cited and relied on, and in the Farley case there was an emphatic dissent by one of the judges. The defendant here undoubtedly had the right under the terms of the lease to declare it terminated, but she did so at a time when she had in her own hands a sum of money belonging to plaintiff's more than sufficient to pay any rent which had accrued and was unpaid. The amount of her damages are easily ascertainable and under these circumstances we think it must be held that this provision of the lease is a penalty and that plaintiff's are liable only for use and occupation.

A subtenant of plaintiff's, one Proudlove, remained in possession of a part of the premises after May 31st and until August 20th, when he was put out through forcible entry and detainer proceedings instituted by defendant. Defendant proved the rental value of the premises during that time to be \$125 and also made claim against the deposit for the expenses of both forcible entry and detainer suits. The finding of the court was that Proudlove remained under a new agreement with defendant's agents for another lease, and there is evidence tending to sustain that contention. These claims must therefore be disallowed.

The account between the parties may be stated as follows:

Defendant, Sarah E. Peterson, is debtor to the amount
of the deposit without interest

\$5,000.00

Plaintiffs, Frank Kafka and Frances Kafka,
are charged with the unpaid rents for
March, April and May at the rate of
\$1,000 per month.

\$3,000.00

Plaintiffs are charged with the
amount expended by defendant for re-
pairing plumbing and replacing wash
bowls removed by them,

472.95

Total,

3,472.05

Leaving a balance due, for which plaintiffs
are entitled to recover,

\$1,527.95.

The judgment of the Municipal court will therefore
be reversed with a finding of facts and judgment here against
defendant, Sarah E. Peterson, and in favor of plaintiffs, for
\$1527.95.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE.

McSurely, P. J., and O'Connor, J., concur.

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The court finds as facts that on May 22, 1924, defendant, Sarah B. Peterson, devised and leased to plaintiffs, Frank Kafka and Frances Kafka, certain improved premises in the State of Illinois at a rental of \$900 per month for the first four months and \$1,000 per month for the balance of the term, payable in advance on the first day of each month; that said lease was to begin on the 1st day of June, 1924, and was for a term of ten years; that as security for the faithful performance of the covenants and agreements of the lease, plaintiffs deposited with defendant the sum of \$5,000; that plaintiffs defaulted in the payment of rent; that by reason of such default defendant elected to terminate the lease, sued plaintiffs in forcible entry and detainer and obtained judgment; that plaintiffs surrendered said premises on May 31, 1925; that defendant became and is liable to plaintiffs for the amount of said deposit less such items as she is entitled under the terms of her agreement to retain in satisfaction of her damages; that she is entitled to retain \$3,000 for rent and use and occupation of said premises by said plaintiffs prior to the surrender of the same and the further sum of \$472.05 necessarily expended by defendant in restoring certain fixtures which were wrongfully removed by plaintiffs from the premises prior to the surrender of the same; that there remains a balance due from defendant, Sarah B. Peterson, to plaintiffs, Frank Kafka and Frances Kafka, of \$1827.95, for which said plaintiffs are entitled to judgment against Sarah B. Peterson in this court.

The court filed its order on May 22, 1914, and

ordered, under the authority of the court, that the

trust funds and the proceeds of the same be paid to the

State of Illinois as a credit of the fund for the

year ending June 30, 1914, and the balance of the fund,

be paid in advance on the first day of each month, and also

that the same be paid on the first day of each month, and also

that the same be paid on the first day of each month, and also

of the proceeds and the proceeds of the same, and also

with reference to the sum of \$1,000,000, and also

payment of the same by means of such bonds or other

as determined by the court, and also

that the same be paid on the first day of each month, and also

thereof on May 22, 1914, and also

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33854

JAMES PETRULAS,
Appellee.

v.

JULIUS SALK, HARRY SALK
and MAX WARD,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

238 1A 025

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Petrulas sued defendants, alleging the wilful, malicious, tortious and fraudulent conversion by them of certain goods and chattels, the property of plaintiff, to his damage in the sum of \$3,000.

The affidavit of merits denied that plaintiff was the owner of these goods and chattels or entitled to the possession of the same; averred that no demand had been made by plaintiff for the same, and denied any intention to cheat or defraud plaintiff. The affidavit admitted that a Kimball piano belonged to plaintiff, but asserted that they had repeatedly requested plaintiff to remove it. It further averred that the electric sign mentioned in the statement of claim was purchased by plaintiff under an agreement that it should become the property of defendants; that with the exception of the piano and the electric sign, the goods and chattels had become a part of the real estate owned by defendants and leased to plaintiff; that the lease had been cancelled and surrendered by mutual agreement of the parties on July 9, 1928, and that with the exception of the piano and sign the chattels were part and parcel of the equipment which was originally leased to plaintiff, together with the theater on the premises; that this equipment was not the property of plaintiff but he was permitted to use the same in the

operation of a theater under the terms of the lease and was obliged to deliver up this equipment or to replace it upon surrender or termination of the lease.

There was a trial by the court and a finding for plaintiff and judgment thereon in the sum of \$370, motions for a new trial and in arrest having been overruled.

Some of the uncontradicted facts appear to be that defendant are the owners of a theater building situated at 3028 West Chicago avenue and known as the "Geneeda Theatre." Plaintiff occupied these premises under a lease dated September 7, 1925, made prior to the purchase of the premises by defendants and the continuation of this lease made after the purchase by defendants and dated November 23, 1926. Plaintiff was unable to pay the rent for the months of May and June, 1928, and at the request of defendants gave his notes therefor. As plaintiff was unable to make further payments, on July 9, 1928, the parties entered into a written contract whereby plaintiff agreed to surrender the premises and defendants agreed to cancel the lease as of that date and also to cancel the notes which had been given for rent unpaid for the months of May and June. The notes were at that time in the hands of the Austin Realty Company.

Thus far, the facts seems not to be disputed but the evidence as to other occurrences is decidedly contradictory. It seems that the agreement was executed at the downtown office of defendant Ward, who is a lawyer, and the evidence of plaintiff shows that after the execution of this agreement, Mr. Ward suggested that they go to the theater; that when they got to the theater there was a paper on the door and a custodian in the theater; that they went into the theater and turned the lights on and inspected it, and that Ward said to George Petralas, a brother of plaintiff who represented him at that time, "I want to have what is mine, and what is yours

is yours;" that on the next day George Petrulas, in company with Kappakostas and Makris, went to the building and asked Ward to give him the keys so that he could take out those goods and chattels which consisted of electrical equipment; that Ward then said to him that he had changed his mind and would not give him anything; that Petrulas then said that he would have to go to the court and that Ward said, "Only they can pass my body out from the place, but not those things."

This evidence, as well as other testimony was offered in behalf of plaintiff, tending to show a demand for the goods and a refusal and also tending to show admissions by defendants that plaintiff was the owner of the goods and chattels. Evidence to the contrary was offered by defendants. Apparently, the trial court was constrained to find for plaintiff by reason of uncontradicted evidence which showed that defendants levied a distress warrant against plaintiff and his brother as the owners of these goods and chattels on July 14, 1928, filed the same in the Municipal court on July 16, 1928, and caused a summons to be issued against them on a demand for rent in the sum of \$459.94. This demand was verified by the affidavit of a clerk in the office of defendant Ward. On July 21, 1928, this suit upon the motion of defendants was dismissed.

At the conclusion of the evidence, defendants submitted certain propositions of law and fact, on which they demanded the ruling of the court. They asked the court to find as a matter of fact that defendant Ward cancelled the original lease and the extension thereof and the judgment note accepted by plaintiff to evidence rent in arrears upon surrender of possession of the demised premises and fixtures on July 9, 1928. And further that no demand was made by plaintiff or his agent for any of the fixtures contained

As "young" first on the west day through testimony, in company with

Kaplanovskaya and Kabanov, went to the building and asked "how is

give him the keys as they are found in the room and then asked him to

which consisted of the following: (1) the keys were found in the

that he had changed the keys and took the keys from the building and

He said that he had the keys in the room and he had the keys in the

"and said: 'I am very sorry that I have lost the keys, but I

have a key."

This evidence, as well as other testimony was taken in

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in the demised premises. The court refused to so hold, stating that the first part of the proposition was of no significance at all and that as to the latter he would have to find, "No."

Defendants asked the court to hold as a matter of law that the pleadings in an action of distress for rent, wherein no service had been had and which was dismissed on motion of a plaintiff, could not be construed as proof of the title to the property in an action in trover wherein the pleadings in the case disposed of were offered in evidence. The court refused to so hold.

Defendants asked the court to hold that the proof of conversion in an action in trover must show a positive tortious act which deprived plaintiff of his property permanently or for a definite time and that the refusal to deliver the property must be absolute and amount to denial of plaintiff's title to the possession thereof. The court so held.

Defendants asked the court to hold as a matter of law that the measure of damages in an action in trover was not the price of the property claimed to be wrongfully withheld from plaintiff but the measure of damages was the fair market value at the time of the conversion, and the court so held.

Defendants cite many authorities as to propositions of law with reference to actions in trover, concerning many of which there is no controversy.

It is urged that the record fails to show sufficient proof of the demand for property, but we think otherwise. Moreover, the levy of the distress warrant was illegal, and we therefore think no demand was necessary. Werner v. Hopsiquet, 44 Ill. 523; Baton v. Hallinan, 220 Ill. 21. Again a demand would have been unavailing. National Bond and Investment Co. v. Wagon, 230 Ill. App. 608; Lee & Chapell v. Penn. Co., 291 Ill. 248.

in the United States. The court found that the plaintiff had not shown that the defendant was a citizen of the United States at the time of the alleged wrong. The court also found that the plaintiff had not shown that the defendant was a citizen of the United States at the time of the alleged wrong.

Defendants also asked the court to find that the plaintiff had not shown that the defendant was a citizen of the United States at the time of the alleged wrong. The court found that the plaintiff had not shown that the defendant was a citizen of the United States at the time of the alleged wrong. The court also found that the plaintiff had not shown that the defendant was a citizen of the United States at the time of the alleged wrong.

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It is urged that the court find in favor of the plaintiff. The court found that the plaintiff had not shown that the defendant was a citizen of the United States at the time of the alleged wrong. The court also found that the plaintiff had not shown that the defendant was a citizen of the United States at the time of the alleged wrong.

Defendants contend that it was error to admit the distress warrant in evidence, citing Godfrey v. Dixon Power & Light Co., 247 Ill. 124, and other cases. There is no merit to this contention. The case turned entirely upon issues of fact, and the judge who saw and heard the witnesses had great advantage in determining those issues which this court does not possess. His finding is entitled to the same weight as the verdict of a jury, and we cannot on any one of the issues of fact say that the finding is manifestly against the weight of the evidence.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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33904

PEOPLE OF THE STATE OF ILLINOIS
ex rel. Thomas J. Caughlin,
Appellant,

vs.

CITY OF CHICAGO et al.,
Appellees.

SUPREME COURT
OF ILLINOIS

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Caughlin filed an amended petition on December 9, 1927, praying that a writ of mandamus issue directed to the City of Chicago, the Civil Service Commissioners and General Superintendent of Police thereof, commanding them to restore him to the position of captain of police in the police department of the City of Chicago, to place his name on the payroll of said office and to expunge from the records of the Civil Service Commission the report of his resignation of said position and the order of the Civil Service Commission approving the same, and that he be at once assigned to duty as captain of police of said city.

The defendants answered, and the cause was submitted to a jury. At the close of the evidence, the court on motion of defendants instructed the jury to return a verdict for defendants, upon which the court, overruling petitioner's motion for a new trial and in arrest, entered judgment, which petitioner seeks to reverse by this appeal.

There is no dispute, we think, upon any material question of fact. It was admitted upon the trial that the City of Chicago was a municipal corporation under the laws of Illinois; that it had adopted on July 1, 1895, the Act of the Legislature entitled "An Act to Regulate the Civil Service of Cities," and that since that time the City has conducted its business in conformity therewith; that under and by virtue of the provisions of that law the City of Chicago created the department of police, and that the

department has been in existence ever since the adoption of the law. The petitioner became a police officer on December 14, 1896. He held at that time the office of patrolman. March 21, 1898, he was made a desk sergeant, on August 19, 1906, lieutenant, and on February 17, 1912, captain. All of these promotions were had under the provisions of the civil service law or merit system, and he remained a captain of police until October 15, 1925. The record of the department contains a paper bearing the signature of petitioner, as follows:

"Department of Police
Chicago
Resignation and Retirement

October 13, 1925.

General Superintendent: I hereby tender my resignation as a member of the police department of the city of Chicago to take effect October 15, 1925. Cause---to take pension.

(Signed) Thomas J. Cayghlin
Rank: Captain 7

Accepted:

This 13th day of October, 1925.

Morgan A. Collins,
General Superintendent."

It further appears that on October 9, 1925, at 3:50^{the} p. m., the petitioner was notified by telephone to be in Chief's office at 10:30 a. m. on October 10th. In response to that order petitioner went to the office of Morgan A. Collins, the then general superintendent of police of the City of Chicago on the morning of October 10th, on the 5th floor of the City Hall of Chicago, and saw him in his private office and no one else was present.

Petitioner testifies that the general superintendent then said that he had sent for him and was sorry to have to ask him to resign; that petitioner asked him why, and the general superintendent said, "Well, we won't -- I want you to resign." Petitioner testified to the conversation that then took place, as follows:

"Well," I said, 'For what purpose?' He said, 'We won't get into an argument. You will resign or I will destroy you and disgrace you.' I said, 'What am I charged with?' He said, 'You will find out before the board.' I said, 'I would like

Department has been in continuous operation since the inception of the law. The Department has been a public utility since December 15, 1908. He held at that time the office of Commissioner. Under the law, he was made a bank examiner, on August 15, 1909, and on February 17, 1910, he was made a bank examiner. Under the provisions of the law, he was made a bank examiner, and he was made a bank examiner on August 15, 1909, and on February 17, 1910, he was made a bank examiner. Under the provisions of the law, he was made a bank examiner, and he was made a bank examiner on August 15, 1909, and on February 17, 1910, he was made a bank examiner.

WILLIAM, JR. WILLIAM

Department of Justice
Washington, D.C.
February 17, 1910
Honorable William J. Williams
U.S. District Court
Chicago, Ill.
Dear Sir:
I have the honor to acknowledge the receipt of your letter of the 15th inst. in relation to the matter of the Chicago & North Western Railway Company, and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

Respectfully,
WILLIAM, JR.

Very truly yours,
WILLIAM, JR.

It is further requested that you be advised that the same has been forwarded to the proper authorities for their consideration. The Department has been a public utility since December 15, 1908. He held at that time the office of Commissioner. Under the law, he was made a bank examiner, on August 15, 1909, and on February 17, 1910, he was made a bank examiner. Under the provisions of the law, he was made a bank examiner, and he was made a bank examiner on August 15, 1909, and on February 17, 1910, he was made a bank examiner.

Very truly yours,
WILLIAM, JR.

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Respectfully,
WILLIAM, JR.

Very truly yours,
WILLIAM, JR.

to find out how.' Well, the argument continued and I went away. I said, 'I am going to see the mayor.' He said, 'Well, that won't do you any good.' 'Well,' I said, 'I am going to see him nevertheless.'"

Petitioner went away telling the superintendent he was going to see the mayor, and he says that the superintendent said, "Well, it won't do you any good. I am going to fight you and disgrace you if you don't sign this resignation." Petitioner answered, "You won't either." He further testified that he thought he could see the mayor but he couldn't; that he didn't see the superintendent again until the morning when the resignation was signed, which was October 13th, although his recollection was that it was signed on the 15th; that it bears his signature and that he wrote his name and rank on it and nothing else; that the chief had it in his hands when he went in; that he doesn't know but surmised who prepared it; that when he signed it no one besides himself and Morgan A. Collins was present; that in that conversation Collins said, to him, "I will give you until Monday noon," or whatever day it was. "If by that time the mayor hasn't indicated that he wants you discharged and that he wants to keep you in the department, I want you to come in here and sign that;" that petitioner agreed, recognizing that "they had all the cards;" that there was practically no conversation when the paper was signed; that the superintendent handed the resignation to him and according to his agreement he signed it. He denies that he signed it voluntarily; he was then 58 years old, in good health and has at all times enjoyed good health. When he signed this resignation he understood that it was his resignation as captain of police and that it would have the effect of separating him from the service, but he says that he did not intend to resign unless compelled to; that he knew whether he resigned or not, the result would be the same; that by speaking of the "cards" he meant that the administration had decided that he was gone; that they decided to separate him from the service; that the mayor refused to

see him, while ordinarily a police captain has access to the mayor's office at any time he has business there.

He says he asked the superintendent why he wanted his resignation, and the superintendent replied that he would tell him that before the trial board; that he knew that under the law he could go before the trial board, although charges had been preferred against him, but that he felt he was beaten before he went there; that at that time nothing was said about charges; that he did not know the Federal grand jury had indicted him until the indictment was returned; that the indictment came a long time after, five or six months; that the newspapers had been threshing out this Federal indictment; that they hadn't threshed that out before he handed in his resignation; that nothing was communicated to him except what Collins said, and that was indefinite; that Collins refused to tell him.

He says that he thought the administration for a purpose of its own wanted to get rid of him; that he had seen that done before a great many times in the police department; that he also knew that the action of the Civil Service department could be reviewed by the courts, if it was unjust; but that he could not afford to carry on a fight at that time; that shortly after signing the paper the United States grand jury in Chicago indicted him, together with others; that the indictment was finally ~~not returned~~ November 16, 1927, and that the original petition in this case was filed on November 17th thereafter. Petitioner says he believed that things would be so manipulated that the Civil Service Commission would discharge him regardless of any testimony that "I might be able to give;" that after his resignation he got his pension promptly and that he is still getting it.

Until the commencement of these proceedings petitioner insofar as the record discloses, made no effort to recall or disavow

the resignation which had been accepted. He now retains and enjoys all the benefits of the pension which he obtained through the presentation of his resignation, and its acceptance by the officials of the City. It is, we think, unquestioned law that in order that a resignation may be complete and operative there must be an intention to relinquish a portion of the term of the office or employment accompanied by the act of relinquishment. It is so held in Biddle v. Willard, 10 Ind. 62, upon which petitioner relies. That is a case, however, where a resignation in writing was delivered on August 4th to take effect in January of the following year, and the court held (consistently, we think) that there was no vacancy in the office until January. It may also be conceded to be the law that a resignation from an office or employment procured by fraud or coercion and delivered without the intention on the part of the person resigning to relinquish the office, which he in fact refuses to give up, is either void or voidable, as was held in State ex rel. Ladsen, 104 Minn. 357, another case cited by petitioner. In that case, however, the member of the school board whose resignation was obtained acted immediately and refused to relinquish his office. Here, the petitioner not only relinquished the employment but took the benefit of his resignation in the way of a pension obtained only through the delivery and acceptance of his resignation.

Petitioner's case is clearly distinguishable from People ex rel. O'Connor v. Harding, 324 Ill. App. 100, the only Illinois case cited in his behalf. It appeared in that case that on July 5, 1916, the relator, under circumstances somewhat similar to which petitioner here testifies, delivered to the city comptroller a letter signed by him, in which he tendered his resignation as chief clerk, "to take effect immediately upon my failure to report for work at any time." This letter was held by the comptroller until January 10, 1919, without any action being taken on it. As the evidence

shows, the relator having become seriously ill and confined to his bed under the care of a physician and was unable to report for duty. The resignation was thereupon accepted, and when upon recovering from his illness, he reported for duty he was led to believe that he would be restored to office and because of promises to that effect delayed making a formal demand for restoration until July 7, 1929. The second division of this court held that under these circumstances the resignation could not be said to have been given by the party of his own free will; that he might have repudiated the resignation at any time; that in order to constitute a complete and operative resignation there must be an intention to relinquish a part of the term accompanied by the act of relinquishment; that illness which was of so serious a character as to render a person unable to perform the duties of his employment constituted a sufficient cause for remaining away from duty during its continuance; that the comptroller was not justified in treating the resignation of July 5, 1916, as absolute and accepting it on January 10, 1919, and that the Civil Service Commission should not have approved of the action of the comptroller in so doing.

It is apparent ⁱⁿ that case that the delivery of the resignation was conditional and that the lapse of time between its delivery to the comptroller and its delivery by him to the Civil Service Commission for acceptance was such that the withdrawal of the same might be inferred. There is no such situation here. As already stated, the resignation was given by petitioner only after investigation by him, and it was promptly accepted by the proper authority. For more than two years he has, without protest, acquiesced in that acceptance. He at once obtained the benefits to be derived therefrom and even now retains and holds those benefits. He cannot under these circumstances be heard to say that the resignation was coerced under duress. Moreover, under

the uniform holdings of this and the Supreme court, the circumstances here upon the face of the petition show such laches as prevent the relief asked for. A few of the many cases which might be cited are Kennecally v. City of Chicago, 228 Ill. 498; Schultheis v. City of Chicago, 245 Ill. 167; Fresno v. City of Chicago, 246 Ill. 26; People v. Baydette, 229 Ill. 48; Hualey v. City of Chicago, 207 Ill. App. 350; People ex rel. Mitchell v. City of Chicago, 243 Ill. App. 180; People ex rel. Holland v. Finn, 247 Ill. App. 53.

The judgment of the Superior court is affirmed.

AFFIRMED.

McSurely, F. J., and O'Connor, J., concur.

[illegible]

.....

EMERY C. PRONGER et al.,
Appellants,

vs.

MILLARD A. RAUHOFF et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

257 Ill. 625

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Complainants on June 10, 1927, filed a bill seeking the foreclosure of a mechanic's lien. A general demurrer to this bill was sustained, and on March 21, 1929, an amended bill was filed, to which a general and special demurrer was also sustained. A second amended bill was filed on June 10, 1929. A general and special demurrer to this bill also being sustained, complainants filed a third amended bill July 29, 1929. Defendants again demurred generally and specially. The court upon hearing sustained the demurrer, and complainants electing to stand by their bill, a decree was entered that the same be dismissed for want of equity. This decree defendants seek to reverse.

The ground of the demurrer to the third amended bill was that complainants had failed to state facts therein tending to show that the suit was begun within four months after the time that the final payment for work done and material furnished was due. As complainants were sub-contractors, such statement of facts was necessary in conformity with section 33 of the Lien act. Smith-Hurd's Ill. Rev. Stat. 1929, chap. 82, p. 1822. This section has been construed by the Supreme Court in a case where it was held that a bill is defective which fails to aver such facts. North Side Sash & Door Co. v. Hecht, 295 Ill. 515.

Complainants say that where, as here, the amended pleading does not show on its face at what time the original pleading was filed a demurrer does not lie upon the ground of limitation of time for bringing the action, but that such defense

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

WILLIAM A. RANNEY, et al.
Appellants.

100-100000

THE UNITED STATES DEPARTMENT OF JUSTICE

Complaints on June 10, 1937, filed a bill seeking the
forfeiture of a mechanic's lien. A general demurrer to this bill
was sustained, and on March 21, 1938, an amended bill was filed,
to which a general and special demurrer was also sustained. A
second amended bill was filed on June 10, 1938. A general and
special demurrer to this bill also being sustained, complainants
filed a third amended bill July 29, 1938. Defendants again demurred
generally and specially. The court upon hearing sustained the de-
murrer, and complainants electing to stand by their bill, a decree
was entered that the same be dismissed for want of equity. This
decree defendants seek to reverse.

The ground on the demurrer to the third amended bill
was that complainants had failed to state facts therein tending to
show that the suit was begun within four months after the time that
the final payment for work done and material furnished was due. As
complainants were sub-contractors, such statement of facts was neces-
sary in conformity with section 33 of the lien act. Section 33 of the
Ill. Rev. Stat. 1935, Chap. 88, p. 1323. This section has been
construed by the Supreme Court in a case where it was held that a
bill is defective which fails to aver such facts. Wells v. Wells

3 Door Co. v. Wright, 293 Ill. 518.

Complainants say that where, as here, the amended

pleading does not show on its face at what time the original

pleading was filed a demurrer does not lie upon the ground of

limitation of time for bringing the action, but that such defense

must be raised by plea. They cite Lloyd v. Davis, 123 Calif. 348; Redington v. Cornwell, 90 Calif. 49; Balteyer v. Wipit, (Texas Civ. App.) 49 S. W. 1055, and from this jurisdiction, Brinks Express Co. v. O'Donnell, 88 Ill. App. 459, and Wende v. Chicago City Ry. Co., 271 Ill. 437. It may be granted that the rule for which complainants contend obtains in the practice under certain codes and in actions at law where it is desired to interpose the defense of the statute of limitations. However, as the case already cited shows, the proceeding here is not of that nature. The right to a mechanic's lien is purely statutory, and the averment of the facts set forth in section 33 are essential to the statement of a cause of action under the statute in cases where that section is applicable. The cases upon which complainants rely are not at all similar and are not applicable here. This point is controlling and renders a discussion of others unnecessary. North Side Sash & Door Co. v. Hecht, 295 Ill. 515, is decisive. The prior pleadings having been abandoned by filing amended bills, no cause of action on this record appears to have been stated until July 29, 1929.

The decree of the Circuit court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

WALTER G. MANON, formerly doing
business as Manon & Woodward,
Appellees,

vs.

ARTHUR ROSS and MARTHA ROSS,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 I.A. 626

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendants to recover \$360 he claimed was due him for broker's commissions for securing the execution of a written contract by the defendants and other parties for the exchange of real estate. There was a trial before the court and a finding and judgment in plaintiff's favor for the amount of his claim.

The record discloses that the defendants owned a bungalow in Chicago and wanted to exchange it for other property and for this purpose submitted it to the plaintiff, who was a real estate broker. After some negotiations plaintiff presented to the defendants a flat building whose owners wanted to exchange it for other property. After some negotiations a written contract was signed by the defendants and the owners of the flat building for the exchange of their properties. The consideration mentioned in the contract, which defendants were to receive for their bungalow was \$12,000 and it was to recover three percent of this as commissions that plaintiff sued. The defendants refused to carry out the contract for the alleged reason that the owners of the flat building had misrepresented the amount of rent that was being received for the several flats. The defendants sought to prove this defense and evidence was offered tending to show that the owners of the flat building, at the time the negotiations were being carried on, represented that each of the four flats was rented at \$56 per month and in addition there were rents derived from one or more

garages, while the fact was, as disclosed when the parties met to carry out the contract some time after it was executed, that the rent was but \$48 per flat, including garages. Defendants' evidence was further to the effect that at the time the owners of the flat building made these representations as to rents received, plaintiff's representative was present and endeavoring to bring about the execution of the contract for the exchange of the properties; but even the testimony of the two defendants on this question is not entirely satisfactory. Arthur Ross's testimony is to the effect that the owners of the flat building represented to Mrs. Ross that one of the four flats was rented for \$56 per month. Evidence was offered on behalf of the plaintiff in rebuttal to the effect that three of the flats were rented for \$50, \$53 and \$56 respectively and the other was occupied by the owners.

Upon a consideration of all the evidence in the record it is entirely probable that the learned trial Judge was of the opinion that the defendants were repudiating their contract for the exchange of the properties, not so much on the ground of the income derived from the flat building as from their desire to be relieved from the exchange of the property. Upon a careful consideration of all the evidence in the record we are clear that we would not be warranted in disturbing the finding of the court in favor of the plaintiff. We are, however, of the opinion that the amount of the judgment is not warranted. The written contract executed by the defendants and the owners of the flat building provides that defendants' bungalow should be conveyed at a consideration of \$12,000. The contract was executed by the owners of the two pieces of property. It expressly provides: "This contract shall be held by Hanen & Woodman" (plaintiff brokers) "for the mutual benefit of the parties concerned, and after consummation thereof Hanen &

Woodham shall cancel and retain this contract permanently." Some time after the contract was executed the following paragraph was written on the back of it:

"It is mutually understood and agreed that the price of aforementioned bungalow shall be Eleven Thousand Five Hundred (\$11,500.00) Dollars instead of Twelve Thousand (\$12,000.00) Dollars as heretofore set forth, and purchase money mortgage adjusted accordingly."

This was signed by the owners of the two properties. While the evidence is not specific, we think it sufficiently appears that this modification was assented to by plaintiff, because the contract expressly provides it was held by him and there is no evidence to the contrary. The consideration for defendants' bungalow, \$11,500 as modified, was the consideration on which plaintiff's commission should be based. Three percent of this is \$345.00.

The judgment of the Municipal court is reversed and judgment entered in this court in favor of the plaintiff and against the defendants for \$345.00. The defendants will be required to pay all court costs.

JUDGMENT REVERSED AND JUDGMENT ENTERED
IN THIS COURT.

McSurely, P. J., and Patchett, J., concur.

1. The following information is being furnished to you under the provisions of the Freedom of Information Act, 5 U.S.C. 552.

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While the evidence is not conclusive, it is suggestive of a connection between the two cases.

There is a possibility that the results of the study may be influenced by the sample size and the duration of the study.

... ..

[illegible]

Spills will be minimized by not overfilling drums as 90%, 110%, and

2) also in United States, based on current regulations of 1975

1997, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

1. The following information is being furnished to you for your information only and is not to be used for any other purpose.

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valued to any other land.

... ..

33931

DAN DEVER and GERTRUDE Y. DEVER,
Defendants in Error.

vs.

INTER-STATE INVESTMENT COMPANY,
et al.,

A. L. SALZMAN,
Plaintiff in Error.

WRIT OF HABEAS CORPUS
OF COUR. CRIM. CT.

2571A. 026

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Dan Dever and Gertrude Y. Dever, his wife, filed their bill against a number of defendants seeking to have two trust deeds executed by them and conveying certain premises in Rockford, Illinois, one to secure an issue of bonds in the sum of \$500,000 and the other to secure notes in the sum of \$40,000, set aside and declared null and void and the bonds and notes delivered up and cancelled, and for general relief. A. L. Salzman, one of the defendants, was served with summons and was defaulted. Certain other defendants filed their answers and the cause was referred to a master in chancery to take the proofs and make up his report. The master heard the evidence, made up his report, and afterwards a decree was entered sustaining the report and granting the prayer of the bill. Salzman, who will hereinafter be referred to as the defendant, as stated, was defaulted. He made no objections to the master's report or to the decree - in fact, none of the defendants made any objection to the decree entered November 25, 1923. The only one questioning it is the defendant Salzman, who sued out this writ of error.

The bill of complaint was filed July 14, 1924, and so far as it is necessary to state the allegations, they are that the complainants were the owners of a piece of real estate located in the city of Rockford, Winnebago county, Illinois; that the defend-

ALL DOCUMENTS AND RECORDS
RELATING TO THE
CASE OF
THE
STATE OF
NEW YORK
IN THE
MATTER OF
THE
ESTATE OF
JAMES
M. SMITH
DECEASED
BY WILL

2000

THE STATE OF NEW YORK, IN SENATE,

January 1, 1900.

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE, IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE, MAY 1, 1899, RELATIVE TO THE LANDS BELONGING TO THE STATE.

The Commission has the honor to acknowledge the receipt of your resolution of the 1st of May, 1899, and to inform you that the same has been referred to the Committee on Land and Water, and that the report of the said Committee is herewith submitted to the Senate.

The report of the said Committee is divided into two parts, the first of which contains a general statement of the lands belonging to the State, and the second of which contains a detailed statement of the lands belonging to the State, and is accompanied by a map of the State, showing the location of the lands belonging to the State.

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Very respectfully,
COMMISSIONERS OF THE LAND OFFICE.

ants entered into a conspiracy whereby it was represented that the defendants, or some of them, would construct a building on complainants' property without cost or expense to complainants; that to do this it would be necessary for complainants to execute a trust deed to the property securing a bond issue of \$300,000 and another trust deed securing mortgage notes in the sum of \$40,000, which would be a junior lien on the premises; that complainants, relying on defendants' promise, executed the trust deeds, bonds and mortgage notes and turned them over to certain of the defendants; that no building was ever constructed on the premises and that the defendants never intended that the building would be constructed. The prayer of the bill was that the two trust deeds, bonds and mortgage notes be delivered up and cancelled; that the defendants be enjoined from disposing of any of the bonds or notes; that if any of the bonds or notes had been transferred to bona fide owners, an accounting be had. There was also a prayer for general relief.

The master heard the evidence and it appears from the decree, the evidence not being in the record, that \$10,400 worth of bonds were held by bona fide owners; that all but \$600 worth of the bonds were delivered up and cancelled except the \$10,400 above mentioned; that all of the \$40,000 mortgage notes were delivered up and cancelled and a decree entered sustaining the allegations of the bill; that in addition to decreeing the cancellation of the trust deeds and the invalidity of the bonds and notes except the \$10,400 of the bonds, a personal decree was entered against certain of the defendants, including Salzman, whereby they were required to pay the \$10,400 face value of the bonds, with interest thereon aggregating \$4,034.75; rents complainants lost by tearing down an old building on the premises in the sum of \$8420; life insurance premium of \$250 paid by complainants in connection with

the transaction; \$150 for revenue stamps; \$99.50 for a building permit; \$325 for traveling expenses; \$11,700 for attorney's fees; \$300 for receiver's fees; and \$2,001 paid to the master in chancery for his fees.

The defendant Salzman contends (1) that the decree is wrong and should be reversed because the findings of the decree are at variance with the allegations of the bill; (2) that the prayer of the bill did not warrant the relief granted in the decree; and (3) that the bill charged the defendants jointly with fraud, but the decree finds that one of the defendants so charged was not guilty and that another, who was not a party to the suit, was guilty of being a party to the conspiracy.

The defendant Salzman contends that the bill prayed only for the cancellation of the trust deeds and the bonds and mortgage notes and that he relied upon the fact that no decree would be asked against him except that he deliver up the mortgage notes, which were all that he had received, and that since all the notes were surrendered and cancelled it is error to enter a personal decree against him; that there were prayers for special relief in the bill, and that only such relief could be given. This is not the law. Cassstevens v. Cassstevens, 227 Ill. 547. It was held in that case that under a prayer for general relief the court might grant relief warranted by the evidence and allegations of the bill, although the specific relief prayed for must be denied. We think it unnecessary to set forth the allegations of the bill or the findings of the decree, but it is sufficient to say that the allegations charged a conspiracy on the part of the defendants, who defrauded the complainants by inducing them to execute the two trust deeds, bonds and mortgages above mentioned; that the complainants relied upon the defendants' promise to construct a building on complainants' property in

Rockford, and that the defendants had no intention of so doing. Obviously in these circumstances the court was warranted in decreeing the cancellation of the trust deeds, bonds and mortgage notes. Nor is there any merit in the contention that the conspiracy charged in the bill was not proven because the decree found one of the defendants acted in good faith. Youngquist v. Hunter, 237 Ill. App. 152. In that case it is said (p. 159):

"The contention that the charge of conspiracy failed simply because some of the parties to the bill charged therewith were dismissed out of the case is wholly untenable. The right to relief or a decree against such defendants as were found implicated in the conspiracy, and profited therefrom, is not impaired by the failure to establish the charge against others dismissed out of the case."

In the instant case the fact that one of the defendants was found to have acted in good faith did not prevent the court from finding and decreeing the other defendants guilty of the conspiracy so charged.

For do we think that there is any merit in the contention that the court was not warranted in requiring defendants to account instead of first entering a decree that an accounting be had as the defendant contends. We think the situation appearing from the bill and decree warranted the court in referring the entire matter to the master, and no objection was made to this procedure. The account was not at all conflicting, and so far as the record discloses none of the defendants made any objection to the reference requiring the master to hear the case and make his report.

The defendant further contends that the court erred in entering a personal decree against him. We think this contention must be sustained except as to the court costs, which include the receiver and master fees. We think there was no warrant in law for entering a personal decree for the \$11,700 attorney's fees.

Whatever claim complainants have as to this item we think cannot be allowed in this case. So far as we are advised, attorney's fees cannot be allowed in a suit except they are a matter of contract or their allowance is warranted by statute. It is not contended that there is any such contract or statute in this case. Complainants, in support of their contention that the court was warranted in entering a personal decree against Salzman and the other defendants, cite the cases of Hopkins v. Wheeler, 71 Ill. 449; Valentine v. Richardt, 126 N. Y. 272; Keller v. Doran, 245 Ill. 290; U. S. v. Dunn, 263 U. S. 121, and Raynes v. Sharp, 238 Mass. 29. We think none of these cases is in point. The Hopkins case was a suit in equity for the rescission of a contract for the exchange of lands upon the ground of fraud. The court found that after the transfer, which was fraudulent, part of the land was transferred to innocent parties. The contract was set aside except as to that part of the land which had been conveyed to innocent parties, and a personal decree was entered against the defendant, estimated at an amount which the defendant had given for the part of the land he had so transferred. In other words, it set aside the decree as far as this could be done and took from the defendant all that he had wrongfully received from the transaction. In the Valentine case, suit was brought to cancel a conveyance of real estate for fraud. After the conveyance the property was mortgaged and the suit sought to cancel this mortgage. The court found the mortgage was made in good faith and entered a money judgment for the value of the land, not as damages but as a substitute for the land itself. To the same effect are the other cases cited, from which it appears that a court of equity will not in such cases permit a defendant to profit by a fraudulent transaction.

In the instant case, however, the defendant Salzman has not profited since all of the mortgage notes he received were

turned in and cancelled and the trust deed securing them was declared a nullity. The fact that the complainants were required to pay out large sums of money through the fraudulent conduct of Salzman and the other defendants, we do not think, under the allegations of the bill as amended, warrants the court in decreeing in this suit that such expenditures be paid by Salzman.

Salzman further contends that he should not be held liable except in a nominal sum for the costs of the procedure because all of the mortgage notes were delivered up and cancelled; but we think this contention is unsound. The suit was made necessary through the fraudulent conduct of Salzman and other defendants. They entered into an unlawful conspiracy to defraud the complainants. It was necessary for the complainants to file a bill to clear their property and in doing so there was \$300 costs for receiver's fees and \$2001 master's fees. No complaint is made that these fees are excessive or not warranted under the law. We are therefore of the opinion that the defendant Salzman is liable for all court costs, including the \$300 receiver's fees and the master's fees of \$2001.

Salzman further complains that there are a number of findings in the decree reflecting on him that have no proper place in such a proceeding, but we think we would not be warranted in disturbing the decree on this account. This court is interested only in the property rights involved.

The decree of the Superior court of Cook county is modified by eliminating the following items: \$14434.75 bonds and interest thereon; \$8420 lost rents, \$250 life insurance premiums; \$150 revenue stamps; \$99.50 building permit; \$325 traveling expense, and \$11,700 lawyer's fees. In all other respects the decree is affirmed. Defendant Salzman having through his fraudulent conspiracy necessitated the institution of the suit and the incurring of great expense by the complainants, will be required to pay costs in this court.

DECREE MODIFIED AND AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

turned in and cancelled and the trust deed securing them was declared a nullity. The fact that the complainants were required to pay out large sums of money through the fraudulent conduct of Salzman and the other defendants, we do not think, under the allegations in the bill as amended, warrants the court in decreeing in this suit that such expenses be paid by Salzman.

Salzman further contends that he should not be held liable except in a nominal sum for the costs of the procedure because all of the mortgage notes were delivered up and cancelled; but we think this contention is unavailing. The suit was made necessary through the fraudulent conduct of Salzman and other defendants. They entered into an unlawful conspiracy to defraud the complainants. It was necessary for the complainants to file a bill to clear their property and in doing so there was \$400 costs for receiver's fees and \$300 receiver's fees. No complaint is made that these fees are excessive or not warranted under the law. We are therefore of the opinion that the defendant Salzman is liable for all court costs, including the \$300 receiver's fees and the master's fees of \$200.

Salzman further complains that there are a number of findings in the decree reflecting on him that have no proper place in such a proceeding, but we think we would not be warranted in disturbing the decree on this account. This court is interested only in the property rights involved.

The decree of the Superior court of Cook county is modified by eliminating the following items: \$1444.75 bonds and interest thereon; \$3430 lost rents; \$250 life insurance premiums; \$180 revenue stamps; \$69.30 building permits; \$322 travelling expense, and \$11,700 lawyer's fees. In all other respects the decree is affirmed. Defendant Salzman having through his fraudulent conspiracy necessitated the institution of the suit and the incurring of great expense by the complainants, will be required to pay costs in this court.

DECEASED RECOVERED AND RETURNED.

McGee, J. J., and Foreman, J. J., concur.

33968

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,
vs.
EMANUEL STERN,
Plaintiff in Error.

WRIT OF HABEAS CORPUS
OF ILLINOIS.

355 100 326

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Emmanuel Stern was charged in an information filed in the Municipal Court of Chicago with making, uttering and delivering a check drawn on the State Savings Loan and Trust Company of Quincy, Illinois, to the order of Hayden, Van Atter and Schimberg, signed by the Leonard Stores Company, Inc., by the defendant as its president, the defendant well knowing at the time that the Leonard Stores Company, Inc., did not have sufficient funds on deposit in the Quincy bank to meet the check; that the check was drawn by the defendant with intent to defraud Hayden, Van Atter and Schimberg out of certain corporation bonds of the value of more than \$15,000, and that the defendant did fraudulently obtain such bonds, the property of "Hayden, Van Atter and Schimberg, incorporated, a corporation." There was a trial before the court without a jury and the defendant was found guilty "in manner and form as charged in the information." A few days afterwards judgment was entered on the finding, in which it was adjudged that "Emmanuel Stern is guilty of the criminal offense of making, issuing, uttering and delivering a check, well knowing at the time of the making, drawing, uttering and delivering of said check he did not have sufficient funds on deposit for the payment of said check," and he was sentenced to nine months in the House of Correction.

The defendant contends that the judgment is wrong and should be reversed because there was no proof that "Hayden, Van Atter and Schimberg, incorporated, a corporation," whose bonds it

Abstract

1997

1. *Phragmites australis* (Cav.) Trin. ex Steud.

Journal of Theology

321.41723

© 2000 Blackwell Science Ltd *Journal of Internal Medicine* 247: 399–406

doi:10.1371/journal.pone.0183905.g002

10. The following information was obtained from the records of the Department of Health and Human Services:

... ..

doi:10.1017/S0022292412001907

and used only for the purpose of the investigation.

1. The first step is to identify the problem or question that needs to be answered.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 08-11-2010 BY 60322 UCBAW

SECRET

THE FOLLOWING IS A SUMMARY OF THE INFORMATION RECEIVED FROM THE ABOVE SOURCES:

1. The Commission has received information that the Government of the United States has been providing financial assistance to the Government of the Republic of the Philippines for the purpose of maintaining the armed forces of the Philippines in the Philippines.

[illegible]

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

(Text as reported in the transcript: 2:10:40-41)

and the following was received from the Bureau of Census:

Approved: _____
Special Agent in Charge

Das ist eine sehr gute Frage, die ich gerne beantworten möchte. Ich habe mich sehr für das Thema interessiert und habe viele Informationen gesammelt. Ich werde Ihnen alles, was ich herausgefunden habe, mitteilen.

Don't tell me I'm wrong. I'm right.

From left to right: (a) $\alpha = 0.05$, (b) $\alpha = 0.1$, (c) $\alpha = 0.2$, (d) $\alpha = 0.5$, (e) $\alpha = 1$, (f) $\alpha = 2$, (g) $\alpha = 5$, (h) $\alpha = 10$, (i) $\alpha = 20$, (j) $\alpha = 50$, (k) $\alpha = 100$, (l) $\alpha = 200$, (m) $\alpha = 500$, (n) $\alpha = 1000$, (o) $\alpha = 2000$, (p) $\alpha = 5000$, (q) $\alpha = 10000$, (r) $\alpha = 20000$, (s) $\alpha = 50000$, (t) $\alpha = 100000$, (u) $\alpha = 200000$, (v) $\alpha = 500000$, (w) $\alpha = 1000000$, (x) $\alpha = 2000000$, (y) $\alpha = 5000000$, (z) $\alpha = 10000000$.

Approved: _____ Date: _____

(see figure 4.1) and the following table shows the results of the regression analysis.

NOT RECORDED AND INDEXED IN THE STATE RECORDS DEPARTMENT OF ALABAMA

After the preliminary investigation, we conducted a longitudinal study with 11

was charged the defendant fraudulently obtained, was incorporated and that this is an essential fact which must be shown by the evidence.

The only evidence we are able to find in the record on this question, is that a witness for the People testified: "I was employed by Hayden, Van Atter and Schimberg, Incorporated, as sales manager." And two exhibits were introduced, one a check signed by the Leonard Stores Company, Inc., by Emanuel Stern, the defendant, its president, to the order of Hayden, Van Atter and Schimberg, which was stamped on the back:

"Pay to the Order of
Central Trust Company of Illinois
Chicago
Hayden, Van Atter & Schimberg,
Incorporated,"

and the other an invoice which was delivered to Stern at the time of the sale of the bonds by "Hayden, Van Atter & Schimberg, Incorporated," which words appeared printed at the top of the invoice.

We think this proof was entirely insufficient. It has repeatedly been held that where one is charged in an indictment with having obtained the property of a corporation therein named, the fact of the incorporation must be proven "either by the charter or articles of incorporation or by proof of user which means the exercise of corporate powers and functions."

People v. Struble, 275 Ill. 163; People v. Erittenbrink, 305 Ill. 244; People v. Fryer, 266 Ill. 216.

In the Struble case the indictment charged the defendant with receiving certain property knowing that it had been stolen from the National Fireproofing Company, which was alleged to be a corporation. It was urged for reversal that there was no proof showing that the National Fireproofing Company was a corporation. The court there said (p. 163):

and that the same is not to be used for any other purpose.

which in which was placed on the wall:

Refrain, let yourself be the order of things, Van der Meer and
aligned by the General's office, that of the General's office, and
sales manager." And the committee also suggested, that a small
was employed by Koster, Van der Meer and Koster, Koster, and
on this question, is that a witness for the General's office: "I
the only witness we are able to find in the record:

to make and as yet
 difficult to compare these figures
 with the figures for the
 year 1950-51, which are
 not yet available.

"...and also other an invoice which was delivered in March or April 1968
of the sale of the bonds by
contracted," which were reported under at the end of the last

...an article of incorporation of the ...
...the fact of the incorporation was ...
...with having obtained the property ...
...has repeatedly been held that there ...
...the United States was ...

1997: *Journal of the American Medical Association*, 278: 1111-1112.

On 10-11-1964, the following information was received from the National Transportation Safety Board (NTSB) regarding the crash of a Cessna 441 at the above location. The aircraft was piloted by a private pilot and was en route to a local airport. The crash occurred at approximately 10:00 AM. The aircraft was found in a wooded area and was completely destroyed. The pilot was not located. The NTSB is currently conducting an investigation into the cause of the crash.

"We see no escape from a reversal of the judgment on the ground that there was no proof that the National Fireproofing Company was a corporation, as alleged in the indictment, etc."

On the trial of the Struble case the bookkeeper and cashier of the National Fireproofing Company, upon being asked how the National Fireproofing Company conducted its business, answered, "'As a corporation.'" There was no other proof upon this subject. The ownership of the property was a material averment in the indictment and it was necessary to prove the ownership as alleged. People v. Aldrich, 225 Ill. 610; People v. Brander, 244 id. 96."

In the Erittenbrink case the indictment alleged that Parke, Davis & Co., the owner of the property stolen, was a corporation. A witness was asked whether Parke, Davis & Co. did business as an individual, copartnership or a corporation, and over objection the defendant answered, "As a corporation." The court said this was no proof but merely the opinion of the witness.

In the Fryer case Fryer was convicted, the indictment charging him with receiving stolen property knowing it to be the property of the Reid Company, a corporation. The court there said (p. 220):

"There was no legal evidence that the Reid Company was a corporation, as alleged in the indictment. Over the objection of the plaintiff in error two witnesses were allowed to state that the Reid Company was a corporation, but this was not competent."

In the instant case there was no proof that Hayden, Van Atter and Schinberg was incorporated as charged in the information. The statement made by the witness, Stewart, in giving the name of his employer as Hayden, Van Atter and Schinberg, Incorporated, and the two documents above mentioned, did not tend in any way to prove that such concern was incorporated. As stated in the Struble case, "The corporate existence alleged must be proved either by the charter or articles of incorporation or by proof of user, which means the exercise of corporate powers and functions."

"We are working hard to improve our service to you."

963 In addition, the respondent said she visited her father's grave at the cemetery.

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THE INFORMATION ON THIS DOCUMENT RELATES TO THE SECURITY OF THE UNITED STATES

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

RECEIVED
JAN 10 1968

[Faint, illegible handwriting]

[illegible]

DECLASSIFIED BY: 6032 JAL/STW/DAW Date of Review: 08-17-2014

as an individual, representing a community, and that of

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

● 2013 年 12 月 1 日起, 凡在《中国药典》2010 年版二部收载的药品, 其包装上必须印有仿单, 仿单上应印有国家药品监督管理局批准的仿单格式, 仿单上应印有国家药品监督管理局批准的仿单格式。

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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1. The first and most important factor in the development of a successful business is the quality of the product or service offered. This is the foundation upon which all other factors are built. A high-quality product or service will attract customers and create a positive reputation for the business.

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After the following was reviewed, it was determined that the information is not relevant.

This document contains information of a confidential nature and is to be controlled and handled accordingly.

THE UNIVERSITY OF CHICAGO

the two documents were written, it is not clear in any way to prove

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* Available for many locations by phone and mail

Under the authorities above cited we must reverse the judgment of the Municipal court.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Watchett, J., concur.

From the foregoing it will be seen that the

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RIVERSIDE BUILDING CORPORATION,
Appellant,

vs.

RICHARD G. REIMER et al.,
Appellees.

APPEAL ON CROSS BILL
CIRCUIT COURT OF COOK COUNTY.

257 I.A. 526¹¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the Riverside Building Corporation seeks to reverse a decree of the Circuit court of Cook county dismissing its cross bill for want of equity.

The record discloses that on August 23, 1928, Lillian A. Bleckle filed her bill against the Riverside Building Corporation and others to foreclose a trust deed securing an indebtedness of \$125,000 on certain property located in Riverside, Illinois. The bill alleged that there was a second incumbrance on the property, secured by a trust deed executed by the Riverside Building Corporation to the City State Bank of Chicago, securing an indebtedness of \$41,900. The Riverside Building Corporation, as defendant in the foreclosure suit, filed its answer and then filed its cross bill seeking to have the second encumbrance, evidenced by the trust deed to the City State Bank of Chicago and the notes to secure the payment of which the trust deed was given, delivered up and cancelled on the ground that the Riverside Building Corporation never authorized the execution of the notes and trust deed and that it received no consideration for them; that Frank W. Nagers, who claimed to be the owner of the trust deed and notes, was not a bona fide holder. On June 25, 1929, Nagers filed his answer, in which he alleged that he was the owner of notes numbers 12 to 61, both inclusive, secured by the trust deed mentioned in the cross bill, aggregating \$37,000; that the Riverside Building Corporation authorized the execution of the notes and trust deed and that he

ALABAMA DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

RECEIVED AT TALLAHASSEE, FLORIDA
JANUARY 1, 1911

TO THE HONORABLE COMMISSIONER OF REVENUE, TALLAHASSEE, FLORIDA

BY BILL ALLEN, THE ALABAMA DEPARTMENT OF REVENUE, TALLAHASSEE, FLORIDA
TO RECOVER A DEBT OF THE ALABAMA DEPARTMENT OF REVENUE, TALLAHASSEE, FLORIDA
THE ALABAMA DEPARTMENT OF REVENUE, TALLAHASSEE, FLORIDA

THE ALABAMA DEPARTMENT OF REVENUE, TALLAHASSEE, FLORIDA
A. ALLEN, THE ALABAMA DEPARTMENT OF REVENUE, TALLAHASSEE, FLORIDA

AND ALSO TO RECOVER A DEBT OF THE ALABAMA DEPARTMENT OF REVENUE, TALLAHASSEE, FLORIDA
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was the bona fide owner and holder of them.

Afterwards, on September 7, 1929, Richard G. Keizer answered the cross bill, setting up substantially the same facts as those alleged in Ringer's answer, tending to show that since the filing of Ringer's answer he, Keizer, had become the owner of the notes and trust deed. Replication was filed and the case heard before the chancellor in open court.

The record discloses that the Riverside Building Corporation was incorporated to construct a building on property at Riverside, and for that purpose it entered into a written contract with the City State Investment Company, whereby the latter company was to construct the building to consist of 24 apartments. The Investment company was to furnish all labor and material and see that the building was constructed according to plans and specifications made by the architect, for which it was to be paid 12 per cent of the cost of the building. The Investment company further agreed to arrange for the loan with which to construct the building and the Building corporation agreed that it would execute notes and trust deeds to secure the notes on the premises. The contract further provided that if the money obtained from such loan was insufficient to pay for the construction of the building, including all expenses, the Investment company could secure another loan sufficient to pay the balance. The Building corporation agreed to execute another trust deed and notes evidencing the same. The evidence further shows that prior to the execution of the notes and trust deed involved in the cross bill, the directors of the Building corporation passed the following resolution:

"RESOLVED, that the officers of the Company be and they are hereby authorized and directed to execute notes aggregating the principal amount of \$41,900.00, secured by a second mortgage trust deed conveying property owned by the Company to the City State Bank of Chicago to secure the above notes, said notes and trust deed bearing date of December 15, 1926."

... in the

Received 2 March 2002; accepted 17 May 2002

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Staphylococcus aureus, *S. epidermidis*, and *S. saprophyticus* exhibited

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U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C.

There is further evidence to the effect that after the money obtained from the first loan secured by the first trust deed was exhausted, the Building corporation had an audit made and there was a balance due and unpaid of \$41,900, and it was to pay this indebtedness that the second trust deed and notes were authorized and executed by the Building corporation.

Counsel for the Building corporation, the cross complainant, states in his brief: "Notes payable to order of maker, but not endorsed and trust deed were signed *** and prepared by an attorney, and that "This supposed junior trust deed, follows the minute, and does not recite that the notes have been endorsed, negotiated or delivered."

There is no warrant in the record for the statement that the trust deed does not recite the notes were endorsed and delivered. None of the notes or trust deed are in the record. The contention that the execution of the trust deed and notes was not authorized, we think is contrary to the record. The stockholders, whose consent cross complainant contends was necessary, had no authority under the law to authorize the execution of the notes and trust deed; that was the duty of the directors. Section 21, chapter 32, Cahill's statute. The Building corporation was authorized to borrow money for the corporation and to secure the payment thereof. Paragraph 7, sec. 6, chap. 32.

A further point is made that the directors' minutes which we have above quoted, although drawn by an investment attorney, did not authorize the "endorsement or delivery of junior security, impliedly intend further action by directors, and withhold any power of disposal."

We think there is no merit in this contention. We think it obvious that when the directors authorized and directed the officers of the company to execute notes aggregating \$41,900,

There is further evidence in the affidavits that the money obtained from the sale is being used by the Government for the purpose of maintaining the military establishment and for other purposes and that there was a balance in the hands of the Government, and it was in fact the Government that the money was being used for the purpose of maintaining the military establishment.

Further, the affidavits submitted, and other statements, appear in the affidavits that the money was being used for the purpose of maintaining the military establishment and for other purposes and that there was a balance in the hands of the Government, and it was in fact the Government that the money was being used for the purpose of maintaining the military establishment.

There is no evidence in the affidavits that the money was being used for the purpose of maintaining the military establishment and for other purposes and that there was a balance in the hands of the Government, and it was in fact the Government that the money was being used for the purpose of maintaining the military establishment.

A further point is that the affidavits submitted, and other statements, appear in the affidavits that the money was being used for the purpose of maintaining the military establishment and for other purposes and that there was a balance in the hands of the Government, and it was in fact the Government that the money was being used for the purpose of maintaining the military establishment.

We wish to state in our affidavit that the money was being used for the purpose of maintaining the military establishment and for other purposes and that there was a balance in the hands of the Government, and it was in fact the Government that the money was being used for the purpose of maintaining the military establishment.

to be secured by a second mortgage trust deed on the property of the cross complainant, they meant just what they said, - that the trust deed and notes should be executed by the officers for the purpose of securing the \$41,900 for the corporation.

Complaint is also made that the court erred in excluding cross complainant's two exhibits. One of these was purported to be a letter from the title officer of the Chicago Title and Trust Company to counsel for cross complainant, in which it was stated that the Title and Trust Company had not issued its guaranty policy with reference to the trust deed mentioned in the cross bill. The other was a letter addressed to Lionel & Company from William S. Holabird, Jr., which stated that Lionel & Company was holding as collateral security "the certain note for \$41,900.00 of Riverside Building Corporation, together with Trust Deed securing the payment of same," as collateral to a note for \$26,700 made by Holabird, and advising that Holabird had no interest in the \$41900 note and requesting that Lionel & Company deliver the collateral to the Riverside Building Corporation upon payment of the note for \$26,700.

We think the ruling of the court was correct. Neither of these offered exhibits would tend to prove that the trust deed and notes mentioned in the cross bill were unauthorized by the Building corporation. Whether the Building corporation has a defense to any part of the notes aggregating \$41,900 we do not decide because the question is not before us, as the cross bill sought to have the trust deed and the notes aggregating \$41,900 delivered up and cancelled. The proof offered in support of the cross bill was in no way sufficient to authorize the court to enter a decree sustaining the cross bill.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

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the same commission, they would not have been able to
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According to the report made by the committee in 1911

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BUILDERS & MANUFACTURERS MUTUAL
CASUALTY COMPANY, a Corporation,
Appellee.

vs.

COYLES FIRE ESCAPE WORKS, a
Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF CHICAGO.

257 LA. 627

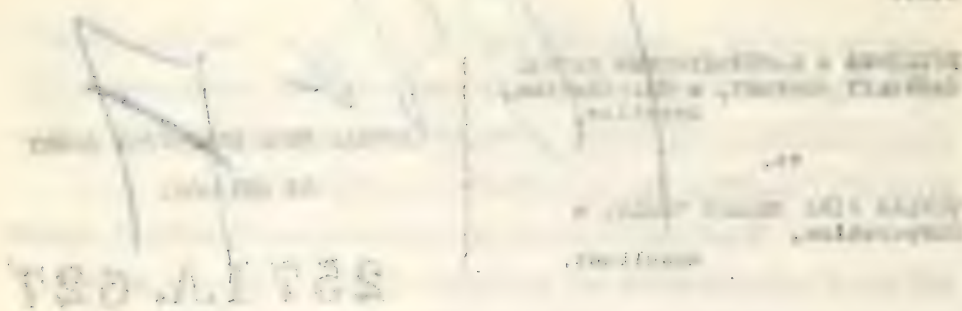
MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse an order of the Municipal court of Chicago, denying its motion to vacate and set aside a default and judgment entered against it.

The record discloses that June 26, 1929, plaintiff brought suit against defendant to recover \$900.02, alleging that its claim was for earned premium on a Workmen's Compensation and Employers' Liability policy issued by it to the defendant. Summons was made returnable at 9:30 a. m. July 9, 1929, and the record discloses that on that date, without disclosing the hour of the day, defendant, on motion of plaintiff, was ruled to appear in-stantly. Defendant failed to appear and default and judgment were entered against it.

The record further shows that on the same day, July 9th, defendant filed its appearance, demand for a jury trial, and its affidavit of merits, in which it denied that it owed plaintiff \$900 for earned premium on the Workmen's Compensation and Employers' Liability policy. It next appears in the record that on August 8th defendant moved that the default and judgment be vacated and set aside and it be given leave to defend. The motion was denied and this appeal followed.

The only question for decision is, should the court have granted defendant's motion to set aside the default and judgment. In support of its motion defendant filed an affidavit in



THE FOLLOWING INFORMATION WAS OBTAINED FROM THE RECORDS OF THE
 DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, AT DENVER,
 COLORADO, ON JANUARY 10, 1917.

THE FOLLOWING INFORMATION WAS OBTAINED FROM THE RECORDS OF THE
 DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, AT DENVER,
 COLORADO, ON JANUARY 10, 1917.

THE FOLLOWING INFORMATION WAS OBTAINED FROM THE RECORDS OF THE
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which it set up that upon being served with summons the matter was turned over to its attorney and that for six months or more the attorney had been in a weak physical condition, suffering from the after-effects of some major operations, and was able to spend only about an hour each day in the discharge of his duties; that on July 9th, the day on which the summons was made returnable, he was unable to appear in court on account of his physical condition. Thereupon he telephoned his office and dictated an affidavit of merits and a jury demand, and instructed the stenographer to prepare and file the same immediately; that the stenographer prepared the papers and they were filed at 12:53 p. m., July 9th; that the defendant did not learn that judgment had been entered against it for several days after that date. The affidavit then denied that defendant was indebted to the plaintiff. We think the court should have allowed the motion. There was certainly little delay in filing the defendant's affidavit of merits, and we think the circumstances disclosed by the affidavit warranted giving defendant a chance to make its defense, the motion having been made within the 30 days. It is the practice in our courts to be liberal in setting aside defaults and judgments where it appears that to do so will promote justice.

The order of the Municipal court appealed from is reversed and the matter remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

McSurely, P. J., and Hatchett, J., concur.

34317

HOLMER, INC.,
(Complainant),
Appellee,

v.

MAX ASTRAMAN and
EINA ASTRAMAN et al.,
(Defendants).

INTERLOCUTORY APPEAL OF
L. MILTON HUSAK and ALETTA
HUSAK (Defendants) from order
appointing a receiver,
Appellants.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT,
COCK COUNTY.

257 LA. 627

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by certain defendants from an order appointing a receiver upon a bill as amended for the foreclosure of a trust deed given to secure the payment of a series of bonds in the aggregate amount of \$145,000 with interest.

The bill was filed January 17, 1930, an amendment thereto was filed on the following day, and the order appointing a receiver was entered on the 20th day thereafter.

The order recites that due notice of a motion was given to these parties who appeal; that the motion was based upon the verified bill of complaint; that the court heard the arguments of counsel; that there was a full hearing, and that "under the circumstances of the case good cause be shown why said receiver should be appointed without a bond." As a matter of fact, however, the record shows that on January 31st complainant filed a bond which was approved by the chancellor.

Defendants appeared and on February 1st answered the bill, but the answer is not verified. For the purpose of this

1941

RECEIVED
(Continued)

1941

1941

RECEIVED
(Continued)

RECEIVED
(Continued)

RECEIVED
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RECEIVED
(Continued)

RECEIVED
(Continued)

This is an appeal by certain persons from an order

granted a writ of habeas corpus for the purpose of
of a writ of habeas corpus for the purpose of
in the writ of habeas corpus for the purpose of

The writ was granted on January 17, 1941, on the ground that
was filed in the following day and the writ was granted a writ
was entered on the writ of habeas corpus.

The writ was granted on the ground that a writ was given

to the writ of habeas corpus for the purpose of

granted a writ of habeas corpus for the purpose of

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granted a writ of habeas corpus for the purpose of

appeal, the averments of the bill must be taken as true.

Most of the points made will require little discussion, as the abstract submitted is quite imperfect. It is urged that the bill of complaint was not properly verified, but neither the verification of the bill nor amendment thereto is set forth in the abstract, while an examination of the record shows a proper verification of both.

It is urged that the appointment of a receiver without notice to the owner of the equity of redemption is erroneous, notwithstanding the trust deed contains a provision, as this one did, authorizing the same, but the record here shows that notice was given.

It is urged that to sustain the appointment of a receiver the bill of complaint upon which it is based must present a prima facie case for ultimate relief, and Imprucht v. Herrick, 113 Ill. App. 398, and Daley v. Nelson, 119 Ill. App. 687, are cited. It is pointed out in this connection that the bill avers that bonds Nos. 54 to 56 inclusive fell due on September 24, 1929, and that the bill contains no allegations as to the accelerated maturity of the rest of the bonds, nor any breach upon which the option to accelerate the maturity could have been based, but an examination of the bill, as it appears in the record, shows that it sets up each of the bonds and the date of its maturity and that the entire issue had matured prior to the filing of the bill, namely, on December 24, 1929. Principal, as well as interest on the loan, was therefore due and unpaid - a clear breach of the covenants of the trust deed. Moreover, the amendment to the bill of complaint (which is also imperfectly abstracted) shows a further encumbrance under another trust deed of \$47,266.85.

It is urged that there was no sufficient showing of the necessity for the appointment of a receiver, but the trust deed assigned and pledged the rents and profits as security for the debt and interest on the same, and as already stated, the bill showed repeated defaults in the payment of both principal and interest.

The order is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

It is noted that the above mentioned items are
the necessary for the equipment of a company, but the same
have not been received and placed in the hands of the
the staff and the interest of the company, but the same
will almost certainly be the result of the same.

and interest.

The above is a statement.

Yours faithfully,

Belmont, 1st May 1911.

33812

JOHN E. PATTERSON, doing
business as J. E. Patterson
Lumber Co.,
Defendant in Error,

v.

WILL H. MOLEY,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$1361.02 entered on a directed verdict in an action to recover an alleged balance due on a shipment of lumber.

Defendant pleaded non assumpsit, a counter-claim for \$453.46, and the statute of frauds. Under direction of the court the jury found the issues for plaintiff on his statement of claim and against defendant's set-off and assessed the damages at \$1361.02.

We think it clear that the evidence in the case shows that there was no material disputed question of fact for submission to the jury but merely a question of law for the court as to the construction of undisputed writings and documents in evidence on which the action was based.

Plaintiff was a dealer in lumber in Mobile, Alabama. Defendant was a lumber commission salesman in the city of Chicago. Their negotiations in the matters involved began with a letter from defendant to plaintiff, September 12, 1927, inquiring what could be done about shipment of certain described lumber f. o. b. New Castle, Ind., at "\$56, subject to \$1 per M commission." Plaintiff replied, "if you will accept this in clear and stain we can name a price of \$56 as per



THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

1944

WILLIAM H. HARRIS
Defendant in Error

THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE

This is an appeal from a judgment of the United States District Court for the Southern District of New York, rendered on the 11th day of June, 1944, in the case of William H. Harris, Defendant in Error, against the United States of America, Plaintiff in Error.

Between the parties there was a stipulation that the following facts be taken as true:

That the said William H. Harris, Defendant in Error, was born on the 11th day of June, 1904, at New York City, New York, and is now residing at New York City, New York.

That the said William H. Harris, Defendant in Error, was employed by the United States of America, Plaintiff in Error, as a clerk in the Department of Justice, from the 1st day of January, 1941, to the 1st day of January, 1942.

That the said William H. Harris, Defendant in Error, was discharged from the service of the United States of America, Plaintiff in Error, on the 1st day of January, 1942.

That the said William H. Harris, Defendant in Error, was employed by the United States of America, Plaintiff in Error, as a clerk in the Department of Justice, from the 1st day of January, 1942, to the 1st day of January, 1943.

That the said William H. Harris, Defendant in Error, was discharged from the service of the United States of America, Plaintiff in Error, on the 1st day of January, 1943.

That the said William H. Harris, Defendant in Error, was employed by the United States of America, Plaintiff in Error, as a clerk in the Department of Justice, from the 1st day of January, 1943, to the 1st day of January, 1944.

The facts are as follows:

Defendant was a clerk in the Department of Justice, Plaintiff, from the 1st day of January, 1941, to the 1st day of January, 1942.

Defendant was a clerk in the Department of Justice, Plaintiff, from the 1st day of January, 1942, to the 1st day of January, 1943.

Defendant was a clerk in the Department of Justice, Plaintiff, from the 1st day of January, 1943, to the 1st day of January, 1944.

Defendant was a clerk in the Department of Justice, Plaintiff, from the 1st day of January, 1944, to the 1st day of January, 1945.

Defendant was a clerk in the Department of Justice, Plaintiff, from the 1st day of January, 1945, to the 1st day of January, 1946.

Defendant was a clerk in the Department of Justice, Plaintiff, from the 1st day of January, 1946, to the 1st day of January, 1947.

Defendant was a clerk in the Department of Justice, Plaintiff, from the 1st day of January, 1947, to the 1st day of January, 1948.

your letter. This stock even though kiln dried could be stained in excess of 5%." On receipt of same defendant on September 16 sent plaintiff a written order for 44,000 feet of "light blue sap, stain admissible if per cent is around 5% at the price of \$56 and agreed commission \$1 per M" to be shipped to H. L. Banks Lumber Company, New Castle, Ind., and invoiced to same at Chicago, at terms "30 or 95%, bill of lading," and saying "Mr. Banks on his formal order will designate what bank to draw on," and advised plaintiff "not to dwell too long on the sap stain part in your acknowledgment, as this may spoil the sale." Thereupon plaintiff being evidently unwilling to take chances of trouble with the proposed customer over the character of the lumber on account of the stain, made a counter proposition by letter of September 20, acknowledging receipt of said order, and saying he accepted the same subject to the following changes: (1) "Blue sap stain not to be considered a defect," and (2) "before making shipment of this, we want it distinctly understood that we are not going to get in trouble if some of this stock runs 20% stain, and inasmuch as there would probably be some question, we are electing to invoice this stock direct to you at \$1 per thousand less, and will give you thirty days 1% or sixty days net. This stock is ready for immediate loading, and we are sending the order to the mill." (Italics ours.)

Replying to this letter September 23, 1922, Belff made no protest against receiving the property and payment by him, but while he stated that he thought it was not "the best policy to keep on writing back and forward about the order for the H. L. Banks Lumber Co. for shipment to New Castle, Ind., for time was too valuable in this case," and there would be no trouble under the wording of his order, he closed his letter by saying: "Now Mr. Patterson, go ahead with the order and do not lose any more time in getting the order to New Castle, Ind."

Following these letters and pursuant to the terms of plaintiff's letter of September 26, three shipments of lumber were made to the Banks Lumber Company, each invoiced to defendant and each stating that the same was sold to him and consigned to said lumber company. They were dated respectively, September 29, 1922, November 14, 1922, and January 3, 1923. The first two stated that the bill of lading was enclosed, and the third that it would follow. No question arises as to the price or amount or character of the lumber, or that these invoices and bills of lading were received by defendant. On notice he produced the invoices at the trial. Each reads: "Sold to Will H. Wolff, Chicago, Ill. Consigned to W. L. Banks Lumber Co., Newcastle, Ind." To the first invoice is added: "We are invoicing to you on basis 156 and allowing your com. separately at \$1 per M. Please handle with Banks promptly."

The bill for the first invoice having been assigned by plaintiff to a bank in Mobile for collection and sent on by it to defendant he wrote plaintiff that the car had not yet reached its destination and that he had referred the bank's letter to the Banks Lumber Company, and urged a shipment of the balance of the order. No allusion was made to the invoicing and making the bill of lading to him.

There was subsequent correspondence between the parties relating to the collection of the account after defendant had failed to make payments, which, however, in the absence of any ambiguity as to whom the sale was made as shown by the letters of September 16, 20 and 25, which closed the negotiations for the sale of the lumber, could not be resorted to for the purpose of construing the contract. The final counter proposition contained in the letter of September 30th, and accepted by the letter of the 15th, as further indicated by retaining the invoices and bills of lading without objection, clearly expressed a sale to defendant. Not until December 28, forty-four days after the second shipment, and his inability to collect from Banks Lumber Company,

did defendant indicate a different intention by wiring plaintiff, "Lanka Lumber Company are parties interested in paying the account." In reply plaintiff expressed surprise, referred to the letter of September 20, and to the fact the goods were invoiced to defendant, and said that he had no account with Lanka and expected defendant to make an immediate remittance covering the past due invoice of September 29, and a remittance for the invoice of November 14 at maturity.

While it appears that defendant was endeavoring to get the Lanka Lumber Company to pay, and the latter subsequently wrote plaintiff volunteering to assume liability and sent trade acceptances which plaintiff returned, plaintiff refused to deal with the Lanka Lumber Company, and on January 30, 1923, so advised defendant stating it would have nothing to do with the Lanka Lumber Company, that it had no contract with them, sold them nothing, expected no pay from them but expected it from defendant. A few days later defendant advised plaintiff that he was mailing a substantial payment on their account, which proved to be a check for \$350 by the Lanka Lumber Company to plaintiff's order. Plaintiff replied that because defendant had advised him of its coming, plaintiff would credit the sum on defendant's account, and again demanded of defendant immediate payment in full. The freight bills on each shipment, marked "Paid," had been sent to plaintiff by defendant.

It is manifest that because of the character of the lumber plaintiff wished to avoid any controversy with the proposed customer, and made defendant a counter proposition to sell and invoice direct to him, and that defendant without objection or protest received and retained the invoices and also the bills of lading, which of course constituted a symbolical delivery of the goods and passed a valid title to him. (Lewis v. Springfield Banking Co., 166 Ill. 511, and cases there cited.) To be sure, the manual delivery of the goods was to the

Banks Lumber Company, but manifestly under directions and on behalf of Rolff. Plaintiff did not accept defendant's offer of a contract with the Banks Lumber Company and entered into no contractual relations with the latter. There was not even any attempt of a negotiation between them as outlined in defendant's original proposition or otherwise. Plaintiff could not have enforced liability against that company. While defendant evidently expected to collect from the Banks Lumber Company and remit directly or through that company to plaintiff, and was apparently unable to do so, the company becoming bankrupt, it is manifest that neither he nor said company would, without plaintiff's consent, substitute the latter as plaintiff's debtor.

There being no dispute of fact it only remained for the court to construe the contract, which, not being ambiguous, is susceptible of no other construction than that of a direct sale to defendant. Its terms are too plain to be misunderstood, and defendant must be deemed to have accepted them.

As the contract was in writing and performed on the part of plaintiff and the goods were delivered and accepted, the estate of frauds is not pertinent to the issues of the case and hence need not be discussed.

Objection was made to the introduction of plaintiff's books of original entry. The proper foundation was made for their introduction, and the contention that they constituted self-serving declarations is not tenable.

It appears that full credit was given to the items of defendant's counter-claim except as to \$11 as to which we find no proof.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

33846

VSRA BURT,
Appellee,

v.

YELLOW CAB COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
BANK COUNTY.

33846

MR. PRESIDING JUDGE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a tort action in which plaintiff obtained a verdict of \$30,000 against defendant Yellow Cab Company as damages resulting from a collision between one of said company's cabs and a street car in which she was riding.

One of appellant's contentions is that the damages are excessive, and must have been based largely on unsupported and unreliable testimony of plaintiff as to many of her alleged ailments that were purely subjective, and on prejudicial argument to the jury. As we think the contention is well founded and requires a remandment of the cause for a new trial we need not discuss in detail either the circumstances of the accident or the nature of her complaints or to what extent it can reasonably be said her alleged injuries resulted from the accident.

She sat in a side seat at the front end of the car, on which there were two other passengers, when the collision took place. Neither they nor any other passengers in the car were hurt. She was the main witness as to the circumstances and to many of her complaints. There was much variance in the testimony respecting the former, and much doubt from the character of the evidence as to the extent of the latter and especially as to the causal relation between them and the accident.

The only objective evidence of injury at the time was a small discoloration. She left the scene of the accident without apparent difficulty. Proof of the numerous pains, ailments and conditions she claimed as a result of the accident depended largely upon the credibility of her own testimony. Her testimony as to their number and character might well excite suspicion and suggest exaggeration without her unquestioned, open and wilful perjury on less important matters. The record discloses that in some fifteen consecutive questions on cross examination, pertaining largely to her family history and connections, which however were competent matters for consideration, she gave false answers and subsequently expressly so admitted under the careful guidance of her attorney in a manifest effort to reinstate her in the confidence of the jury.

As the existence of many of the ailments of which she complained and their causal relation to the accident depended largely, and sometimes wholly, upon her unsupported word, the fact that she was willing to aid her cause by deliberate perjury in material matters, however unimportant in determining the main issues, should make a court and jury hesitate to accept her evidence on more important matters bearing directly on the question of damages. To say nothing of her conflicting statements, the variant testimony and the divergent views of the physicians, we think her manifest perjury and unreliability and the unchecked appeals of her counsel to the jury and his unwarranted and vituperative attacks upon defendant's counsel were enough alone to require a reversal of the judgment and a remandment of the cause for a new trial. Her counsel called the physicians who testified for defendant "common everyday racketeers," defendant's counsel "crooked," said to him "you have called the jury fools and everything else," and was permitted to say that "defendant's counsel is running from one court room to the other crying fraud, accusing every lawyer of wrongdoing."

The only objective evidence of injury to the limb was a small dis-
coloration. The fact the owner of the vehicle claims to have
difficulty. None of the numerous papers, affidavits and statements are
claimed as a result of the accident occurred directly upon the
credibility of her own testimony. Her testimony as to their number
and character will require weighing and proper consideration
without her unimpaired, eyes and without having any form, impression
matter. The recent discovery that in some cases, corrective
questions on most examinations, particularly largely in the family
history and connections, which however were somewhat limited for
consideration, the fact is that the independent evidence as
established under the weight of evidence of her testimony is a matter
effort to maintain her in the confidence of the jury.

As the evidence of each of the elements of which the complaint
and their causal relation to the accident occurred directly, and possibly
wholly, upon her unimpaired word, the fact that she was able to do
has come by telephone directly in relation to her, however, evidence
in determining the main issue, should have a weight and jury decide
except her evidence on which important matters to rely on the
line of damage. To say nothing of her condition afterwards, the
testimony and the divergent view of the physician, which has made
jury and credibility and the unimpaired word of her account to
jury and the unimpaired and objective evidence upon defendant's com-
were enough alone to require a verdict of the jury and a reasonable
the cause for a new trial. Her testimony which the physician and jury
for defendant "cannot testify to her own, defendant's unimpaired word"
said to him "you have called the jury facts and unimpaired facts," and
was permitted to say that "defendant's testimony is coming from her own
room to the other room, according every factor of testimony."

without anything whatever to bring such outside circumstances, if true, into the record. The court surprisingly overruled objections to such argument, thus giving color to justification for such prejudicial and reprehensible remarks. Counsel cannot complain of having their cases reversed when they resort to such unfair, prejudicial and unethical argument. Authorities on the subject are too numerous to call for citation. We need go no further into this record for reversible error.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

[illegible]

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

33988

EDWARD KINGS LUMBER COMPANY
(Plaintiff), W. H. SARGENT
et al., (Intervening
Petitioners),

Appellants.

v.

AMERICAN MAGNETIC PRODUCTS
COMPANY et al.,

Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

20140027

MR. JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is by the four intervening petitioners named in the title of the case from an order or decree dismissing for want of equity the bill of complaint and all the intervening petitions, each seeking a mechanic's lien on premises known as 5730 Roosevelt road, Chicago, Illinois.

March 8, 1921, the Beckley-Balston Company, owner of the fee to said premises, entered into a contract with the American Magnetic Products Company to convey to the latter the property in question. The purchase was never consummated. On an involuntary petition in bankruptcy filed against the latter company in March, 1922, the Chicago Title & Trust Company was appointed receiver and inter alia trustee. In that month the Beckley-Balston Company reentered and took possession of the premises, as under its contract of sale it was permitted to do, thereby forfeiting said contract. The interests of the bankrupt were subsequently sold and bid in by Beckley, the president of the Beckley-Balston Co.

The claim of each of the four appellants to a mechanic's lien is that the Beckley-Balston Company "knowingly permitted" improvements on the premises and thus became chargeable with a lien under section 1



12345

RECEIVED BY THE
DIRECTOR OF THE
BUREAU OF LANDS
WASHINGTON, D.C.

DATE
BY
RECEIVED BY THE
DIRECTOR OF THE
BUREAU OF LANDS
WASHINGTON, D.C.

750-1-108

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LANDS

This appeal is by the land interest holder, petitioner, and
in the title of the case from an order of the Commissioner of the
of equity the bill of complaint and all the accompanying exhibits,
each seeking a declaration of the petitioner's title to the land.
Petitioner, Plaintiff.

March 2, 1901, the Secretary of the Interior, under the
for to said petition, ordered that a hearing be held in the
Petitioner's attorney is hereby to the fact that the property in dispute
Petitioner was never compensated. On an intervening petition in bankruptcy
property there against the Interior company in 1901, the
title to the property was assigned to the petitioner and the
in that matter the Secretary of the Interior received and was
of the petition, as under the contract of sale it was provided in the
Petitioner's petition and complaint. The petition of the petitioner
consequently also and did so by the Secretary, the Secretary of the Interior.

Witness my hand.

The claim of each of the two defendants is a declaration of the
in that the Secretary of the Interior, under the contract of sale, was
as the petition and the intervening petition with a claim under the

of the Mechanics' Lien Law. On this question of fact the report of the master was in favor of the Beckley-Kalston Company. While it held that said company was estopped from questioning the rights of said interveners to liens upon the rights and interests of the Magnesia Company, the chancellor held otherwise and the decree dismissed the several intervening petitioners for want of equity.

On the premises was a two-story building. The contract of sale was subject to a lease of the upper story. Before the Magnesia Company took possession thereof the lower story had been used solely as a warehouse by the Beckley-Kalston Company, which was engaged in handling automobile supplies and electrical equipment, with its main office at 1301 Michigan avenue, some miles away from the warehouse at 5730 Roosevelt road. The Magnesia Company was a manufacturer of stucco, composition flooring and magnesite products for which certain types of machinery were required.

The claims for liens grew out of contracts between the respective intervening petitioners and the vendor. The claim of the Subway Engineering Company is for work done as supervising and consulting engineers, that of Warford for work in connection with erecting and installing storage tanks or silos on the premises, that of the Conroy Company for alterations and repairs in and upon the building and attachments to the silos, the smoke stack and the dryer, and the Keller Company (whose claim is assigned to intervening petitioner Wilcox) for furnishing certain apparatus, machinery and fixtures, and materials for installing the same.

The contract of sale provided for possession by the vendor within thirty days from its execution which was on March 4, 1921. During that interval the vendor's watchman or warehouse manager, one Vaughn, who held the keys to the premises, remained there until all

of the vender's goods had been shipped out. It had been his duty to receive his employer's goods, ship them out and keep the stock in order in the warehouse. During that interval said contractors or parties representing them visited the building and asked to inspect the same and looked it over and Vaughn most always went through with them when they were there. He knew some plumbing was taken out, that the foundation was dug back of the building for the piles, that timber for a derrick was brought to the premises, that the engineer came through and talked about plans and where they would place the machinery. His immediate superior was Schroeder, the vender's superintendent, who had charge of the building at 1301 Michigan Avenue and everything outside of the office. Vaughn, who had charge of the premises in question subject to Schroeder's directions, testified that he asked Schroeder if he should allow "them" to go ahead and "move the work and their own machinery stuff in," and that Schroeder said as a matter of courtesy to allow it and make room for them "and let them move it in." He had no conversation in regard thereto with any of the officers of the vender, either Beckley, its president and manager, or Halston, its vice-president, who were the active persons in negotiating the contract of sale.

In January previous an option contract was given to the vendee to purchase the property and at that time Beckley inquired of Hobins, the president of vender, what was the nature of the vender's business and if it would be objectionable to the neighbors on account of dust that might be created through the grinding of cement, etc. Beyond what this conversation conveyed it does not appear that Beckley or any other officer of the vender company had any information of the character or needs of the vender's business. He testified that he was not personally at the warehouse, as he remembered, from that time until after the bankruptcy of the vendee (March, 1933) and did not know from any source whatever that any changes, modifications, improvements or

of the vendor's goods had been delivered and it was found that the
 20 received his signature's goods, and that the goods were
 in order in the warehouse. During the delivery the goods were
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installments had been or were to be made in the premises in question until the creditors meetings held in 1922. All he knew was that the vendee manufactured stone and crushed stone products. It does not appear that anything was said either at the January conference or at the time of the execution of the contract as to any changes, alterations, or improvements of the property for the vendee's use, or that any of the vendor's officers had any direct knowledge thereof at any time prior to the vendee going into bankruptcy. The Subway Engineering Company was inspecting the building about March 1, with reference to its plans, and timbers for the derrick were brought on the premises about that time and the siles were begun March 23, but Vaughn, whose duties were limited to letting the parties in, was the only one connected with the vendor who had any personal knowledge thereof. Schroeder was there once or twice in that interval but testified that he only saw some old machinery had been moved in but did not know what it was. Otherwise no notice whatever was brought to the attention of anyone connected with the vendor as to the nature or character of what was furnished or required by way of equipment for the conduct of the vendee's business, and there was no direct evidence that the superintendent of vendor or any of its officers had any knowledge of material furnished or labor performed upon the premises until after or about the time of the bankruptcy proceedings. Each denied having any such knowledge. The master so found and also found there was nothing in either the option contract or the contract of purchase which tended to inform the vendor of any kind of improvement the vendee intended to make upon the property in question. On that matter all that can be said is that Beckley, the vendor's president, knew that the defendant expected to use the building in the manufacture of its products and that it would install machinery to crush stone.

Upon such a state of facts appellants claim that the Beckley-Kelston Company "knowingly permitted" the labor to be performed and

the material furnished for which the liens are claimed. Vaughn only had knowledge of what was done. But he had no authority to deal in reference to these matters except to allow things to be moved in before absolute surrender of possession. It was not within the scope of his duties to ascertain what they were going to do with, or how they were going to install, their machinery, and it not being within the scope of his duties he was under no duty to communicate any facts pertaining thereto to his principal. "Ordinarily the person having knowledge or to whom the notice is given, must be an officer or other agent of the corporation at the time the knowledge was obtained or notice given." (4 Fletcher on Corporations, pp. 3426-7, note, 3316-3318; United Disposal v. Industrial Con., 291 Ill. 488-490; People v. Guilborg, 334 Ill. 838.)

The contract of sale was executory. Under it, of course, the vendee had neither the legal nor equitable title to the property. (Capps v. National Union Wire Ins. Co., 315 Ill. 380-383; Eudelman v. American Ins. Co., 297 Ill. 324-325.) The vendor still continued to be the owner of the premises and, as before stated, took possession thereof under the terms of the contract because of the breach thereof. There was no proof of any direct authorization by the vendor to make alterations or improvements on the premises and there is nothing in the contract of sale or the circumstances from which any implication of such authority is warranted. The vendee had no interest subject to such liens, and the sole question is whether it can be said from the facts and circumstances the Beckley-Balston Company, the owner of the premises, knowingly permitted the alterations and improvements to be made. That the burden was upon the lienors to prove every fact required by the statute to establish their right to a lien cannot be questioned. (Haack v. Isenberg, 333 Ill. 588-595.) Notwithstanding the provision in the present Mechanics' Lien Act which provides that it shall be liberally construed as a remedial act it was held in North Side Bank &

Peor Co. v. Recht, 325 Ill. 513-515, that the act must be strictly construed with reference to all requirements upon which the right to a lien depends. Can it be said, therefore, in the absence of any authorization given to the vendee to make improvements or alterations of the premises, or of any notice to the officers or executives of the vendor corporation, or of any direct knowledge on their part of such alterations or improvements or of facts that tended to put the company on notice, that it knowingly permitted them to be made? We think not. It was said in Williams v. Vandervill, 143 Ill. 333-340, that the estate of the lessor cannot be subject to a lien for work done or materials furnished under a contract with the lessee unless the agreement or consent of the lessor is shown, or unless he has done some act to make his estate liable. Practically the same language was used in Grandall v. Borg, 198 Ill. 48-51. It was said in Birmingham v. Hill, 164 Ill. App. 536: "To knowingly permit property to be improved is to know that material is being procured for that purpose and the work being done and not to object to it." The cases cited by appellants on this point are either those where express authority was given to make suitable changes, etc., necessary to adapt the premises to the business in which the vendee was to engage or where the owner had direct knowledge of the improvement and made no objections thereto. In one of the cited cases the owner said he "supposed" the work was being done and it was held that the law under those circumstances would fasten upon him knowledge of that fact. But in the case at bar there was nothing to indicate that the owner or vendor had any knowledge of defendant's business or how it was conducted or what changes would be necessary, if any, for the operation of its machinery.

Appellants argue that the vendor had constructive knowledge of the alterations and improvements in question because it must have inferred that some alterations or improvements would have to be made

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to enable the vendee to conduct its business on the premises, and as so indicating the contract of sale is subject to the provision among others that the vendee will not suffer any mechanic's lien to attach to the premises. In other words, that the vendor could be chargeable with knowledge of whatever might be done to create liens on the premises. While we do not think any duty was imposed upon the vendor to inquire how the vendee proposed to conduct its business or what was being done on the property, the language used by the statute, "knowingly permit," implies, we think, actual knowledge or such actual notice of improvements or alterations as would put the owner on inquiry. That is the import of Long v. Grandall, 233 Ill. 79.

We deem it unnecessary to discuss the claim of a lien by the doctrine of estoppel. It is based upon the vendor's answer to the receiver's petition in the bankruptcy proceedings wherein the vendor claimed that the items of machinery had become a part of the real estate and could not be sold separately therefrom, and also based upon the fact that the order of the sale of the property sold in by Overley transferred the trustee's title thereto "subject to all liens," etc. But there was nothing in these facts on which to predicate estoppel. They did not change the position of the lien claimants in any respect.

We think the decree of the court should be affirmed.

APPRAISED.

Scanlan and Gridley, JJ., concur.

33896

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WILLIAM CONIS,
Appellee,

v.

FRANK A. CARELIN,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

257 I.A. 628

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal by Frank A. Carelin from a decree that he and the Northern Trust Company account to plaintiff for receipts and disbursements in dealings and transactions had in certain real estate the title to which is held by said company as trustee under a will.

The following facts found by the master, to whom the matter was referred, are not in controversy:

The Northern Trust Company as such trustee had entered into a contract to sell said real estate to one Loughlin. That contract having been assigned to George A. Carelin, he and three others (including complainant) entered into an agreement December 21, 1923, whereby he was to hold the legal title to the premises, when acquired, as trustee for the use and benefit of himself and them, and they were to be entitled to participate in the net profits derived from the sale or sales of the premises in certain proportions. The proportionate interest of Conis was 12 1/2 per cent.

The agreement provided for the employment of appellant as their sole and exclusive agent to manage and sell said real estate for such price and on such terms and conditions as he might deem advisable, with power to subdivide the same, lay sidewalks,

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sewers, water pipes and pavements and pay for the same out of the proceeds of sales, and generally to manage said premises in all respects as though the premises were his own property, and provided that he should "render a just and true account of all his acts and doings to the parties hereto upon their request." He was also given power to make loans and borrow money and to make payments on the contract with the Northern Trust Company and for any other purpose necessary in the proper management of the premises.

October 23, 1924, another agreement was entered into between appellant and his brother George as parties of the first part, and the remaining parties to the prior agreement as parties of the second part, which, after reciting that the parties had arrived at a settlement of all their investments in the property upon a certain basis, provided for a distribution of the proceeds from the sales of the remaining lots to each of the parties of the second part evidently in satisfaction of their interests.

November 14, 1924, another agreement was entered into between appellant and George A. Carvelin and appellee Conis whereby they considered the contract of October 23, 1924, canceled as to said Conis, and that he be considered as a party to the investment to the same extent as before the contract was executed and declaring his interest to be one-eighth of the net proceeds realized from the sales of said property and declaring what should be deemed "net proceeds" after provision for certain expenses.

having
It appeared at the hearing that Frank Carvelin purchased the interest of George in the syndicate property the cause was ordered dismissed as to the latter. This left as the only parties interested in the proceeds from the sales, appellant and appellee.

About April 23, 1926, the two Carvelins left Chicago for

a trip to Europe. A few days before they left, Frank Carelin offered to buy Gonis' interest in the syndicate for \$13,500, and Carelin's automobile, a Paige car, valued at \$2,000; \$3,500 was to be paid in cash and \$10,000 to be evidenced by two judgment notes. Whether there was a consummation of a contract is one of the questions in dispute, it being claimed by appellant that before he left for Europe, Gonis took possession of the car under that agreement. No other payment was made, or attempted to be made, until a tender was made by appellant on the hearing.

The master found that no agreement between appellant and Gonis for the sale of the latter's interest was consummated at that time, and in effect that the automobile in question did not come into possession of Gonis under such agreement. No useful purpose would be subserved in reciting the evidentiary facts relating to that phase of the case. From an examination of them it would seem that the master's conclusion was justified if he believed, as the evidence indicates, that the possession of the automobile by Gonis grew out of another relation between Gonis and appellant whereby it had been in Gonis' possession for several months prior to the offer of appellant to purchase his interest, as aforesaid, during which time he drove the car nearly every day for appellant, and during the last two months of which he lived in appellant's home.

Said offer not having been accepted, as found by the master, the only remaining question is whether under the evidence Gonis was entitled to an accounting.

That appellant was his agent and had agreed to render an accounting is unquestioned. The only attempt to render one disclosed by the evidence is that about two weeks before appellant left for Europe and after Gonis had demanded one, a bookkeeper's statement was furnished by Carelin to Gonis. That statement was introduced

in evidence as plaintiff's exhibit 4. It is not in the record. It is stated in the abstract, but not in the record, that it has been lost. Whether what said statement contained complied with the requirements of an accounting of Carolin as the trusted agent of Conie, the testimony is too meager to enable us to determine. We must, therefore, in view of the findings and decree indulge the presumption that it was not.

The master found from certain evidence that a relation of trust and confidence, outside of that imported by the nature of the agency, existed between appellant and Conie. Such a relation was not directly charged in the bill nor necessary to sustain the right to an accounting. The finding with regard thereto was unnecessary and superfluous. If a trust relation were necessary to an accounting, we think the character of the power and authority vested in appellant, giving him exclusive, full and absolute control of the property impressed the same in his hands with a trust for the benefit of his principal. To be sure, the original relation of the parties had changed so that appellant and appellee were left as the only beneficiaries of the proceeds of the sale made, or to be made, of the premises involved. They were virtually partners with respect thereto, appellant having seven-eighths and appellee one-eighth interest therein. But the relation of principal and agent between them established by the contract of December 31, 1923, continued to exist. One of the duties under that contract was that the agent would render a just and true account of his acts and doings on request. With respect to that obligation appellant's answer admits the agreement but merely denies that complainant has been unable to procure information or an accounting, and predicated his defense mainly on the claim of

having consummated an agreement to purchase complainant's interest.

On our review of the evidence we think the master was justified in finding that neither contention is supported by a preponderance of the evidence. All details of the transaction were within the sole knowledge of defendant, and the books and papers with regard thereto were in his possession and under his control.

Among other things revealed by the evidence was that appellant had sold "\$162,00 worth of property," and had placed a mortgage on certain unsold lots to secure a loan of \$38,000, the disposition and disbursements of which are not fully disclosed by the evidence.

While appellant testified that no money was as yet due to Conis from the transaction and that he had had various conversations with him that in effect informed him of them, and that when he departed for Europe the books he had kept were left in an unlocked desk to which Conis had access, we fail to see that these facts have any tendency to relieve him from his express obligation to render such a detailed account of his transactions as would apprise Conis of the real state of affairs as to the actual receipts and disbursements.

Much that is discussed in the briefs seems entirely irrelevant to this basic right on which the bill is founded.

The point made that complainant did not file a replication until after the hearings before the master, but nevertheless before his report, has no real merit.

ATTORNEYS.

Scanlan and Gridley, JJ., concur.

having commenced an attempt to secure the necessary funds.

On the review of the evidence in which the majority was

frustrated in finding that the evidence is supported by a

preponderance of the evidence. The details of the transaction

were within the sole knowledge of the witness, and the witness was

known with respect to the facts of the transaction and under the

circumstances.

There is no other evidence in the case which would

support the claim of the witness, and the witness was

known with respect to the facts of the transaction and under the

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33909

PAUL C. JOHNSON,
Appellant,

v.

BENEKE MANUFACTURING CO.,
a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

257 1A 428²

MR. PRESIDING JUSTICE BARKES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for defendant for costs in an assumpsit suit. The declaration consists of a count alleging that plaintiff was on January 1, 1927, employed by defendant at \$12,000 a year and continued in that employment until July 1, 1927, when he was discharged without cause, by reason of which he suffered damages in the amount of \$6,000, and of the common counts alleging damages in the amount of \$18,000 for unpaid salary for services rendered under annual contracts of employment for the years 1921, to 1926, inclusive, and the first six months of 1927. The case was tried under the common counts.

The grounds urged for reversal are that the verdict was against the weight of the evidence and error in giving defendant's instructions 1 and 2.

The only evidence heard was the testimony of appellant and Henry Beneke, president of defendant company, and a deposition of one Propf, a former president of the company.

Plaintiff's employment began October 1, 1919, under an oral agreement whereby he was to be paid on the basis of \$12,000 a year, drawing \$3000 a month salary and \$6,000 from the company's earnings. He continued to work on that basis until just before July, 1921, when owing to the company's financial condition, depression in business and

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1971-1972

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 2684-2685, 2686-2687, 2688-2689, 2690-2691, 2692-2693, 2694-2695, 2696-2697, 2698-2699, 2700-2701, 2702-2703, 2704-2705, 2706-2707, 2708-2709, 2710-2711, 2712-2713, 2714-2715, 2716-2717, 2718-2719, 2720-2721, 2722-2723, 2724-2725, 2726-2727, 2728-2729, 2730-2731, 2732-2733, 2734-2735, 2736-2737, 27

1. The first of these is the fact that the Government has been unable to obtain any reliable information as to the whereabouts of the missing persons. This is due to the fact that the Government has been unable to obtain any reliable information as to the whereabouts of the missing persons.

The following are the names of the persons who have been identified as having been in contact with the subject of this investigation:

The only evidence seems to be the testimony of a witness who testified that he saw a man, who was identified as a former president of the company, and a witness who testified that he saw a man, who was identified as a former president of the company.

being as the company's financial condition is not as good as it was in 1934, and the company's financial condition is not as good as it was in 1934, and the company's financial condition is not as good as it was in 1934.

the fact that the company was losing money and the salaries of employees were being reduced Beneke suggested a reduction of plaintiff's salary. As to just what arrangements were then made there is a disagreement. Plaintiff testified that Beneke said if he was unwilling to take a cut in salary his services would have to end at the end of that year; that they then engaged in a discussion as to what was the best thing to do and Beneke asked him what he thought ought to be done, that he advised the selling of the carburetor business and obtaining additional funds for the business by a bond issue on the plant; that Beneke was not in favor of a bond issue at that time, whereupon he said to help the company's cash position he would agree to defer \$3,000 of the additional \$6,000, drawing only \$9,000 each year instead of \$12,000 "until such time as the financial arrangements we had been discussing were consummated," and that Beneke then said that was agreeable to him. Thereafter for the remainder of the year 1921, until June 30, 1927, he drew only \$9,000 a year. Early in that year Beneke had told him that he would have to end his employment and later in April or May told him that he could not afford to pay him any longer and that his services would terminate July 30. Plaintiff testified that there were other conversations after July, 1921, with regard to the sale of the carburetor rights of defendant and the issuance of bonds. These two matters, the sale of the carburetor business and the issuance of bonds, appear from plaintiff's testimony to have been the only financial arrangements discussed at the time plaintiff's salary was reduced to \$9,000. It appears that bonds were not issued until in 1926, on which the company got the money in July, 1927, and that the carburetor business was sold in April, 1927.

It was upon this version of facts plaintiff sought to recover under the common counts, his theory being that the parties had agreed to defer the payment of \$3,000 a year until said carburetor business

was sold or funds were obtained from a bond issue.

On the other hand, Sencke testified as to the great changes that had taken place in the business as aforesaid when the conference was had with plaintiff, that he then told him after a full discussion that he would leave plaintiff's salary \$6,000 a year with a bonus of \$3,000 instead of what he had been drawing, that he absolutely did not tell him in substance or effect that he expected to pay him the \$8,000 additional for each year he worked when he should sell the carburetor or put a bond issue on the plant, and that no negotiations to do either were had until about four years after that conversation. It appears that the company had not been making any profit at the time of said conversation, that it paid no dividends, that its business became seriously crippled and continued so during the period of plaintiff's employment.

The only other testimony bearing on the arrangement was the deposition of said Kroyf, that after considerable argument "finally it was left so that Mr. Johnson was to draw the \$8,000 and we would make up to him the difference whenever the business would warrant it."

While there is room for a difference of view as to just what was the arrangement made when plaintiff's salary was reduced, the contradictory evidence was such as to make it particularly a question of fact for the jury to determine, and under the unvarying practice of this court a judgment will not be reversed as against the weight of the evidence unless this court can say that it is manifestly so. That we cannot say in this case.

It is also urged that defendant's given instructions 1 and 2 were erroneous. Instruction 1 told the jury "you must not find for the plaintiff unless you believe that a preponderance of the evidence shows that the defendant agreed that when it sold the carburetor patents or issued bonds, it would pay to the plaintiff \$5,000 a year

was sold by Lord's very children from a home in New York.

On the other hand, several questions as to the exact character of the thing which is the subject of the present case are raised by the fact that the thing is sold with a guarantee.

That he would have a certain amount of money in a year, with a bonus of

\$2,000 instead of what he has been receiving, would be a considerable sum.

Tell him in substance an amount which he expected to pay for the thing.

and if he had paid for it he would have been paid for it.

to get a good thing in the market, and that he was willing to be taken

very bad until about four years after that conversation. It is

that the company had not been making any profit at the time he was

invested, that is, he had no interest in the company. He was

invested in the company and was not interested in the company's affairs.

and.

The only other testimony bearing on the subject is the

testimony of the witness who was present at the time of the

it was said that Mr. Johnson was to have the thing and he would make

up to him the difference between the money he would receive and

While there is some testimony to the effect that he was

and the arrangement made with him was a very good one, the

contradictory evidence was given as to what is particularly a question of

fact for the jury to determine, and under the foregoing facts of this

case a judgment will not be rendered in favor of the party

whose witness has been shown to be unreliable. That is

cannot say in this case.

It is also noted that the witness's own testimony is not

very strong. In fact, I think the jury may have been

the witness's own testimony that he was not interested in the company

about that the witness's own testimony is not reliable.

There is no other evidence. It would be for the plaintiff to show

additional to the \$9,000 agreed to be paid."

Instruction 2 reads as follows:

"You are instructed as a matter of law that the burden of proof is not upon the defendant to show that it did not agree in June, 1921, to pay the plaintiff when the Dayfield Carburetor should be sold or a bond issue put on the plant, \$3,000 for each additional year that the plaintiff worked for the defendant but the burden of proof is upon the plaintiff to show these facts by a preponderance of the evidence and if he has failed to do so then you must find the issues for the defendant."

The main objection to the first instruction is that it confines the jury to the issue of fact whether there was an agreement to defer payment of \$3,000 a year additional until the carburetor patents were sold or bonds were issued. As that was plaintiff's own version of the arrangement and the theory on which his case was presented, as also indicated by his given instruction No. 3, so fail to see that he can complain of error in instructions given at defendant's request based on the same theory.

The principal complaint made as to the second instruction is its statement that the burden of proof was upon plaintiff to show the particular facts therein recited. It was unquestionably the theory of plaintiff's case that there was an agreement to defer his salary until there should be a sale of the carburetor or a bond issue on the plant before he would be entitled to recover \$3,000 for each additional year, and his given instruction No. 3 required as a basis for a finding in his favor that plaintiff and defendant agreed "that the payment of \$3,000 of plaintiff's salary each year after July 1, 1921, should be deferred and that payment thereof should be made whenever the carburetor rights of the defendant were sold, or when money was raised by mortgaging the defendant's property."

Both of these instructions complained of, as well as the one given in plaintiff's behalf, are predicated upon plaintiff's own evidence of an agreement to defer payment of a balance of \$3,000 a year until the happening of one or two contingencies. That there was any

such agreement was expressly denied by Bencke. The burden of establishing it as the basis of plaintiff's right to recovery was, therefore, upon plaintiff. It was not, as appellee seems to argue, a case wherein defendant pleaded an affirmative defense. Of course, if it did, it would have the burden of proving it. But under the plea of general issue defendant in denying plaintiff's claim as to the character of the new arrangement was entitled to deny it and give its own version thereof and did not have the burden of showing that plaintiff's version was not true. Whether there is an affirmative defense is determined from the pleadings.

Both parties stated that there was a new arrangement made and in effect after July 1, 1927. Plaintiff's testimony is to the effect that it was only as to deferring payment of \$3,000 a year until the happening of one or both of said contingencies, and that they having happened he was entitled to \$3,000 a year for the six intervening years he had worked before their happening. Defendant's evidence was to the effect that there was an absolute agreement for a change of salary to \$9,000 a year with only an indefinite understanding that it might be changed when business became more prosperous, but not upon the contingencies testified to by plaintiff. The jury must be deemed to have settled the truth with regard thereto.

In view of defendant's testimony presenting the issue of fact as to that matter it cannot be presumed that the original agreement for a salary of \$12,000 a year continued in force in spite of such arrangement, as contended by appellant. Cases cited in support of that contention do not rest upon analogous facts and therefore do not require discussion.

The jury having decided the controverted fact in defendant's favor under instructions embodying plaintiff's own theory of liability, the judgment is affirmed.

Scenlan and Gridley, JJ., concur.

AFFIRMED.

33917

JOSEPH H. BUETTAS,
Appellee,

vs.

EDWARD A. GARVEY, etc.,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

2571-028

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit for damages for holding over after termination of a lease which provides the lessee on failing to yield up possession of the premises shall "pay as liquidated damages, for the whole time of such possession is withheld the sum of \$25 per day." The declaration claims damages for \$7,575 with interest, being at the rate of \$25 per day during the period the premises were withheld after notice given of the termination of the lease.

Defendant filed the plea of general issue and supported the same by an affidavit of merits which the court ordered stricken "as insufficient in law." Thereupon judgment was entered as in case of default under Section 55 of the Practice Act. Plaintiff having admitted a credit of \$4,513 paid to him by the Maryland Casualty Company the court deducted the same from the face of the claim, and assessed the damages at \$3,062.12, for which the judgment appealed from was entered.

The sole question presented is whether the affidavit of merits was properly stricken.

The nature of the defense as set forth therein was based on six grounds, in substance and effect as follows: (1) that all sums owing for rent and damages had been paid by the Maryland Casualty Company; (2) that plaintiff had withdrawn its notice of termination of the lease by giving a notice to that effect and by

WILLIAM A. HANCOCK, JR.
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WILLIAM A. HANCOCK, JR.
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 WASHINGTON, D. C.

This is a copy of the report of the committee on the subject of the proposed amendment to the Constitution of the United States, as passed by the House of Representatives on June 13, 1913. The report is in the form of a letter from the committee to the House, and is signed by the chairman, Mr. William A. Hancock, Jr. The report is in the form of a letter from the committee to the House, and is signed by the chairman, Mr. William A. Hancock, Jr. The report is in the form of a letter from the committee to the House, and is signed by the chairman, Mr. William A. Hancock, Jr.

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executing a lease to defendant for additional space in the same building for a period expiring at the same time as the original lease; (3) that because said notice of termination was withdrawn defendant remained in possession of the premises; (4) that the notice of termination was not given in good faith; (5) that the provision in the lease for \$25 per day as liquidated damages is one for a penalty, and (6) the notice was given under a rider attached to the lease that conflicts with the original lease.

If as contended by appellee the first ground states a conclusion rather than a statement of fact, yet claiming as it does payment of both rent and damages by the Maryland Casualty Company, it seems somewhat inconsistent that the court should have acted upon plaintiff's admission of payment of \$4,513 by that company and at the same time strike the defense without permitting defendant to show what that payment covered. For aught the pleadings show, or anything in the record, that payment may have been in full satisfaction of plaintiff's claim. What we may surmise from the argument with respect thereto is not inferable from the record.

But regardless of whether a good defense was sufficiently stated in respect of payment, if as stated in the second ground of defense plaintiff withdrew notice of the termination of the lease and defendant was thereby induced to hold over, defendant was entitled to set it up as a defense to any damages in excess of unpaid rent. As said in Kenwood Hotel Co. v. Hiland, 183 Ill. App. 108, the law will not uphold or justify a landlord in inducing a tenant to remain in possession of the premises after the expiration of the lease, and then enforce against him liquidated damages beyond the rental value of the premises for withholding the same. The court also said that while such an act on the part of the landlord

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might not be a defense to an action for possession, it is a defense to the recovery of any amount beyond the rent reserved in the lease, or rental value of the premises. On the principles there stated we think the second ground of defense was good as to any damages in excess of unpaid rent. If so the third and fourth defenses, which evidently rest on the same ground, need not be considered.

The fact pleaded in the declaration that plaintiff obtained possession of the premises in question under a judgment in a forcible detainer proceeding that was affirmed by this court did not, as argued, constitute res adjudicata of the question of damages in excess of unpaid rent. The issues in the two causes of action are entirely different.

The fifth defense was also good. It cannot be said as a matter of law that the provision for liquidated damages should not be interpreted as a penalty. The language of the contract in that respect is not of itself conclusive. (Advance Management Co. v. Franks, 268 Ill. 579.) As said in that case, courts will look to see the nature and purpose of fixing the amount of damages to be paid, and if it appears to have been inserted to secure the prompt performance of the agreement it will be treated as a penalty and not more than actual damages proved can be recovered, citing Westfall v. Albert, 217 Ill. 68. We do not think without any evidence the court could say merely from an inspection of the lease, made a part of the declaration, that the damages sustained from holding over should necessarily be construed as liquidated. There is nothing therein to indicate that the actual damages could not be ascertained. In doubtful cases the courts are inclined to construe the stipulated sum as a penalty. (Iroquois Furnace Co. v. Wilkin Mnf. Co., 181 Ill. 532.) Whatever was ground for termination of the lease evidence might disclose no actual damages, or if so,

much less than those fixed in the lease.

As the affidavit stated at least two good defenses we think it was error for the court to strike it and enter judgment as in case of default under said section 55.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

55964

15

RALPH H. JACKSON, doing
business, etc.,
Defendant in Error,

v.

G. CLYDE FARSON,
Plaintiff in Error.

7

REPORT TO MUNICIPAL
COURT OF CHICAGO.

252 1A 528

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff sued for and recovered a verdict and judgment for \$4,500 in a suit brought for alleged earned commissions in having procured a customer on defendant's terms for the purchase of certain real estate the latter had placed with plaintiff for sale. The main controveray of fact was whether defendant ever submitted the property for sale on the terms on which the proposed purchaser was willing to buy.

Plaintiff had defendant's property for sale at a price of \$150,000 and proposed that defendant take in part payment a lot with a fifty foot frontage owned by said customer at the rate of \$2,500 a front foot. Several interviews were had as to a cash payment and the terms of the balance of the purchase price. As to them defendant testified that he always adhered to \$150,000 for his lot, allowing only \$2,000 a foot for the customer's. Plaintiff's testimony was to the effect that defendant finally agreed to take the property in exchange on a basis of \$2,500 a foot. On that point their versions of the agreement are diametrically opposed and there are no facts or circumstances that clearly corroborate either version.

But having the effect of corroborating plaintiff's version the customer was permitted to testify over objection to what plaintiff claimed defendant was saying or said to him over the telephone. From the witness' testimony it appears that he went to the plaintiff's office and requested the return of the contract he had signed and left with plaintiff and also a check left therewith as earnest money, thus indicating his unwillingness to go on with the contract, and that plaintiff thereupon remarked: "Let's see if we can get straightened. Let me call him up" (referring to calling defendant over the telephone) and then apparently had a conversation with some one over the telephone. Defendant's counsel objected to his testifying to what plaintiff said as the witness did not know and could not tell that defendant was at the other end of the telephone. The court overruled the objection, whereupon the witness testified: "Mr. Jackson said, 'I will call up the owner. While I waited he called up the owner. Mr. Jackson said the only deal he could make is \$180,000. That will give you \$2,500 for yourself.'" That Jackson thus stated was said to him by defendant over the telephone, which the witness himself did not hear or pretend to hear, was clearly hearsay evidence and not binding on defendant. The purport and effect of such testimony were to corroborate Jackson's version that defendant had agreed to take the customer's property at the rate of \$2,500 a foot and as it pertained to the only fact in dispute, plaintiff having testified one way and defendant the other, the jury may have regarded this inadmissible evidence as sufficient to decide the fact in plaintiff's favor. For error in receiving such testimony the judgment will be reversed.

In view of the fact that the motion for a new trial was not preserved in the bill of exceptions we are not permitted to consider the claim that the evidence was insufficient. (Anderson v. Barstene, 197 Ill. 76, 79.) Nor need we in view of the reversible error considered.

Scanlan and Gridley, JJ., concur.

REVERSED AND REMANDED.

33984

TOM WINTIMORE,
Appellee,

v.

BERNARD W. SNOW, Bailiff
of the Municipal Court of
Chicago, and GUS PINOS,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

257 I.A. 629

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was a trial of right of property in and to an automobile levied on by the bailiff of the Municipal court under a judgment of said court, as alleged, against one Vlahogeorge and assigned to appellant Pinos.

The trial was had without a jury and this appeal is from the finding and judgment awarding the property to plaintiff.

The alleged errors may be summarized in the assignment that the judgment is against the law and the evidence.

A written contract of purchase of the automobile was entered into April 18, 1928, between Vlahogeorge as purchaser, and the General Motors Acceptance Corporation as seller. Under the terms of the contract an old car was taken in part payment and the balance was to be paid in eighteen monthly instalments of \$54 each, and the seller was to retain title until payment was made in full. In July, 1928, Vlahogeorge being ill and unable to keep up the payments, a verbal arrangement was made between him and plaintiff, his brother-in-law, to take the car off his hands. Thereupon they went to the office of the seller and asked its agent "to turn over" the car to plaintiff, and were told in effect that

the seller did not like to change the name of the purchaser but that when plaintiff paid up the contract in full then he could have the title. Thereupon plaintiff paid the installments as they fell due (eleven in all) up to the time of this action, and in addition a repair bill of \$154 and the monthly garage storage bills until he moved to a place where plaintiff had a garage when it was then kept at his own home.

Plaintiff kept a restaurant and for the last four months prior to the hearing Vlahogeege worked for him in the restaurant and used the car to drive himself there and himself and plaintiff back home. Vlahogeege had no bank account and apparently no means. The payments made by plaintiff were from his own bank account and were never deducted from Vlahogeege's salary.

From the time plaintiff in effect took the contract of purchase off Vlahogeege's hands he had and controlled possession of the car. While the license was taken out in the name of Vlahogeege that fact was not conclusive of either his right of possession or of the question of ownership. Appellants refer to the motor vehicle law requiring the owner of a vehicle to apply for a certificate of registration and that when there is a sale and delivery of the vehicle the vendor shall give to the purchaser a bill of sale. But the failure to comply with this duty does not, under our statute, affect the question of title to the property. The vehicle law in some other states contains provisions that affect the legal title to the property. Cases cited based upon such laws have no application here. No formalities are required by our statutes to effect a contract to sell or of sale of personal property. In the case at bar the title to the property was still in the seller and the equitable title obtained by Vlahogeege was in effect transferred for a consideration

The writer did not like to change the name of the corporation but
that when finally made up was contained in this letter to you
now the title. Therefore finally the corporation was
they call the (changed in all) as to the name of this company, and
in addition a report will be made to the board of directors
which will be given to a place where it will be a large one
it was found that it was not done.

Finally they had a resolution and the last one was
given to the board of directors and it was in the resolution
and then the board of directors and finally the board
back home. Therefore the board of directors and finally the board
The board of directors and finally the board of directors and
were never changed from the corporation's name.

Then the board of directors and finally the board of directors

Therefore the board of directors and finally the board of directors
of the corporation. While the board of directors and finally the board of directors
that they are not concerned with the board of directors and finally the board of directors
the question of ownership. Therefore the board of directors and finally the board of directors
has decided the board of directors and finally the board of directors
regarding the board of directors and finally the board of directors
which the board of directors and finally the board of directors
the board of directors and finally the board of directors and finally the board of directors
about the question of title to the property. The board of directors and finally the board of directors
very often when the board of directors and finally the board of directors
to the property. Therefore the board of directors and finally the board of directors
here. No committee was formed by the board of directors and finally the board of directors
that is all of the board of directors and finally the board of directors
title to the property and finally the board of directors and finally the board of directors
obtained by the corporation and the board of directors and finally the board of directors

to plaintiff. There was no proof of any fraud and the law never presumes it. (Wright v. Grever, 27 Ill. 326.) In fact, nothing was said at the trial about fraud. The transaction took place fourteen months before the levy. The only evidence offered by appellants as against plaintiff's right to the property was that it was seen to be in the possession of Vlahogorge, as above stated, and that the license was taken out in his name. The court saw the parties and heard them testify and there was sufficient evidence of plaintiff's good faith in taking the contract of purchase off the hands of Vlahogorge.

The judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

33994

PETER J. DONAHUE, etc.,
Appellee,

v.

TRUSTEES SYSTEM RFINCO CO.,
a corporation,
Appellant.

APPELLATE DIVISION
OF THE COURT

257 I.A. 629

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$280 rendered upon the court's finding in an action upon a written contract between real estate agents to divide commissions.

When defendant's counsel perceived the case might be reached in a day or two on the trial call he sought to get notice to his principal witness who lived in Chicago and had acted for defendant in the matters in controversy, without whose testimony it could not safely proceed to trial, and who had attended at a previous call of the case when it was continued, and ascertained that the witness was sick and confined in a hospital in the State of Indiana. The following day the case was called for trial and defendant's counsel asked for a continuance, presenting an affidavit stating said facts and setting forth material matters constituting a defense, that the absent witness would testify to the same if present, that defendant could not safely proceed to trial without his testimony, and that if given a reasonable time the witness would be produced in court. Plaintiff would not admit what he would testify to if present. The court, on the theory that defendant had not exercised due diligence, notwithstanding

923 J. I. 179

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[illegible]

the witness could not have been produced even if subpoenaed in time, denied the continuance. We think the court abused its discretion and that the judgment must be reversed and the cause remanded for a new trial. In view of this conclusion the other alleged errors as to the admission and weight of the evidence need not be considered.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

[illegible]

^a Values in parentheses are not significant.

4. 1990年10月1日以前に作成されたもの

34003

ISAAC BERGER,
Appellee,

v.

GRANES COMPANY,
a corporation,
Appellant.

187
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 111 629²

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$175 entered upon the finding of the court in a tort action.

The evidence shows that plaintiff stopped his automobile while driving north on the east side of the street to get water for the car's radiator. While standing at its front trying to remove the radiator cap, defendant's truck, while going in the same direction and passing plaintiff's car, struck the latter, throwing its rear end towards the east curb and its front right fender against plaintiff, knocking him down and causing the injuries complained of.

It is urged that the judgment is not supported by the weight of the evidence, that it does not show negligence on the part of defendant and tends to show contributory negligence on the part of plaintiff. Defendant's witness testified that the car was stopped near a line of cars along the east curb and at an angle of forty-five degrees with the same so that its rear came out into the street. While this testimony was denied by plaintiff we fail to see that that circumstance of itself would indicate contributory negligence if nevertheless defendant's driver had sufficient room to pass plaintiff's car without colliding with it, and there is

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• **Parasitology**

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STATE OF NEW YORK. IN SENATE, JANUARY 12, 1892.

... ..

The evidence shows that the defendant was not involved in the crime.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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Received 10 May 1987; accepted 16 July 1987

...and the ...

* Yu. Averbukh

1. The first part of the report is a general introduction to the project, which includes the objectives, scope, and methodology.

and as a result of this, the results of the study are not to be taken

44. The principal conclusions of these two studies are:

can not be a national matter. I am not. I think to be

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950, and the majority of this increase has been in urban areas. This has led to a concentration of population in a few large cities, which has in turn led to a number of problems, such as overcrowding, pollution, and traffic congestion.

7-10-1954

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SECRET

is more likely to be a victim of a crime than a white male.

nothing in the testimony to indicate that he was confronted with any difficulty in that respect. He saw plaintiff's car and, as far as the evidence shows, could safely pass it by exercising ordinary care. We cannot say that the court's finding was manifestly against the weight of the evidence.

It is also urged that the court erred in permitting recovery both for injuries to the plaintiff and for damage to the car. While such a state of facts may become the subject of distinct causes of action, yet it was held in Clauser v. McBride, 358 Ill. 35, 40, that when accruing to the same person they may be joined in a single suit in a court of competent jurisdiction. However, there was not adequate proof that the payment for repairs to the car was for damage that resulted from the collision. We think, however, the proof of damages from injuries to plaintiff's person made out a prima facie case of liability to the extent of \$150. They consisted of \$80 for plaintiff's loss of two weeks' wages, \$50 as reasonable fee for physician's services, and \$20 for an x-ray examination had on the advice of the doctor. The judgment for \$175 will be reversed and a judgment entered herefor \$150 because of the error in admitting proof of damages to the car without showing they resulted from the collision.

REVERSED AND JUDGMENT HERE FOR \$150.

McDonlan and Gridley, JJ., concur.

34014

LEO SIMON, for use of
Roll-A-Way Bed, a
corporation,

Appellee,

v.

N. SIMON, doing business
as N. Simon & Co.,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2571A. 029⁴

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a garnishee proceeding. It was commenced by filing an affidavit for summons in the usual form and interrogatories, and after service the garnishee answered that at the time of the service of the writ and since that time he was not indebted to the alleged judgment debtor, Leo Simon, and did not have in his possession any credits, etc., belonging to said Simon.

When the cause came on for hearing, plaintiff called the garnishee's bookkeeper, who produced the latter's general ledger, and the court proceeded to examine her with reference to certain items charged therein against the alleged judgment debtor, five of which, aggregating \$600, the bookkeeper explained, represented advances toward expenses and unearned commissions, he being a traveling salesman working on a commission basis. The court thereupon remarked that the garnishee was liable for said \$600 under the case of Palalay v. Park Fireproof Storage Co., 232 Ill. App. 99. The court failed to distinguish the facts in that case from those here. In that case while the garnishee claimed the employe was indebted to him, yet without adjusting the account it continued to pay him a weekly salary after service of the garnishee

process, thus recognizing an indebtedness to him. In the present case the alleged judgment debtor was not working on a salary but upon a commission basis, and nothing was in fact due him, but, as the bookkeeper's testimony tended to show, the payments charged to him were for expenses incurred as a traveling salesman and for advancements against commissions to be earned in the future. The trial having been continued to the following day the attorney for the garnishee asked leave to have the garnishee sworn and testify to such facts and to the actual relationship between him and said employe, and offered to show by him that said employe was working on a commission, that nothing was due him thereon, that said payments were advances against expenses and unearned commissions, and that he was indebted to appellant for over \$8,000. But the court holding that the case was closed for evidence the day before - though the record does not so show - declined to hear testimony by the garnishee and entered said judgment. In so doing the court deprived the garnishee of its legal right to make a defense. When a garnishee answers denying any indebtedness, the statute prescribes that the trial shall be conducted as other trials at law, and the trial was not so conducted. It was within the sound discretion of the court to let in such offered defense and there was no good reason for rejecting it. (People v. Weimers, 225 Ill. 17.)

But the beneficial plaintiff did not make out a prima facie case. The burden was on it to show the existence of a judgment and an execution thereon duly returned "no property found." There was no proof of such a judgment and execution nor any admission thereof. Such proof was essential to a recovery against the garnishee. (N. C. B. B. Co., Garnishee, v. Keckhaus, 31 Ill. 144; LaSalle O.R. Co. v. LaSalle Amusement Co., 229 Ill. 194, 197; Bank of Montreal

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v. Taylor, 86 Ill. App. 333; Davis v. Siegel, Cooper & Co., 80 id. 275; Howard Co. v. Miller, 123 id. 463.) The affidavit for summons against a garnishee stating that an execution was issued and returned "no property found" is not evidence of the fact, and the absence from the record of the issuance of the execution and its return is fatal to the judgment. (LaSalle Amusement Co., supra.) The contention of appellee that the court will take judicial notice thereof is untenable, except where the garnishee proceeding is had in the case in which the judgment was entered. Here it was an original action and a different case.

And there must be a legal debt due or to become due, to be the subject of garnishment (Capra v. Burgess, 135 Ill. 31), and such debt must exist at the time of the answer. (Pressed Steel Equipment Co. v. Thornburgh Presteel Co., 250 Ill. App. 1, and cases there cited.) While unexplained the charges appearing on the ledger might be taken as admissions of a debt, yet if they were advancements, as the garnishee offered, and the bookkeeper's testimony tended, to show, against unearned commissions, the garnishee was not liable. It has been so held as to advancements for unearned wages. (Davis v. Siegel, Cooper & Co., 80 Ill. App. 275.)

Expediting trials is commendable but not at the expense of a litigant's rights. The case should be sent back for recognized procedure.

REVEREND AND HONORABLE,

Donnan and Gridley, JJ., concur.

The court in United States v. Gurnea, 100 F.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 91

34041

207
PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,
v.
LOVIEY ANDREWS,
Plaintiff in Error.

BRANCH TO MUNICIPAL
COURT OF CHICAGO.

257 I.A. 630

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was charged on information with larceny of money of the value of \$13 described as "One (1)-Ten Dollars United States of America Currency," and three "One Dollar United States of America Currency," each described by its serial and currency number. A trial was had without a jury. To reverse the conviction it is urged that the description of the property stolen as "United States Currency" is insufficient to sustain the judgment. In People v. Cohen, 303 Ill. 523, the sole question presented for review was the sufficiency of the description of the property stolen as "one dollar (\$1) good and legal money of the United States of America, of the value of one dollar." The information was held to be sufficient to sustain the judgment. The court said:

"Great niceties and strictness of pleading should only be countenanced and supported when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge or make preparations for his defense for want of greater certainty or particularity. (Gannady v. People, 17 Ill. 158.) The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was inhuman and and when it was necessary for the courts to resort to technicalities to prevent injustice from being done."

The court held that the description was definite and certain of a piece of money of a fixed value, and that there was no difficulty in understanding the nature of the offense charged.

Journal of Management Education 34(10):1139-1150

the following: The first was

in maintaining the security of the national defense. It is necessary to have a high degree of loyalty and devotion to the country and its interests. This is especially true in times of crisis and war. The government has a duty to protect the lives and property of its citizens, and to maintain the peace and stability of the nation. This requires the cooperation and support of all citizens. It is the responsibility of every citizen to do their part to make the country a better place to live in. This means being loyal to the country, obeying the laws, and contributing to the common good. It also means being vigilant against threats to the national security and being prepared to defend the country if necessary. The government has a duty to protect the rights of its citizens, and to ensure that they are treated fairly and justly. This requires the government to be accountable to the people and to be transparent in its actions. It is the responsibility of every citizen to hold the government accountable and to demand that it act in the best interests of the nation. This is the only way to ensure that the government is serving the people and not the other way around. The national defense is a complex and multifaceted issue that requires the attention and cooperation of all citizens. It is not just a matter of having a strong military, but also of having a strong and united nation. This requires a high degree of loyalty and devotion to the country and its interests. It is the responsibility of every citizen to do their part to make the country a better place to live in. This means being loyal to the country, obeying the laws, and contributing to the common good. It also means being vigilant against threats to the national security and being prepared to defend the country if necessary. The government has a duty to protect the rights of its citizens, and to ensure that they are treated fairly and justly. This requires the government to be accountable to the people and to be transparent in its actions. It is the responsibility of every citizen to hold the government accountable and to demand that it act in the best interests of the nation. This is the only way to ensure that the government is serving the people and not the other way around.

The same can be said here. The word "currency" is as certain and explicit as the word "money" and as readily understood. The description here is in fact more explicit than in the Cohen case because it gives the number of each of the described bills. The record contains no bill of exceptions and we must assume that the proof conformed to such descriptions.

The criticism that the currency was not described as "good lawful money of the United States" has no application where the money is otherwise properly described. "United States currency" is lawful money of the United States, and the allegation that it is "of the value of thirteen (13) dollars," thus using the standard of value in this country, is also sufficiently definite.

Fault is also found with the form of the order of the court finding the "value of property \$13," but the point is unworthy of consideration.

Nothing but the common law record is before us. The information was sufficient to advise defendant of the nature of the charge and he evidently understood it for he made no motion to quash the information, nor asked for a bill of particulars, but waived a jury and went to trial.

As indicated by the Cohen case, courts in modern times do not look with favor upon mere nonobservance of technicalities which have no tendency to deprive a party of his legal rights.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

33771

ARTHUR M. GLATT and LESLIE
M. PRICE, doing business as
Glatt & Price,
Appellees,

v.

HUGO ANDERSON,
Appellant.

217
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

257 I.A. 630

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On a second jury trial, had in March, 1929, to recover commissions as real estate brokers for bringing about, as claimed, a sale of defendant's apartment building in Chicago, there was a verdict and judgment against defendant for \$4,405, and this appeal followed.

The first trial resulted in a verdict and judgment against plaintiffs, but on July 10, 1928, that judgment was reversed by this court, on account of the giving of erroneous instructions offered by defendant, and the cause was remanded. (Glatt v. Anderson, 240 Ill. App. 655.)

Plaintiff's declaration consisted of two special counts and the common counts. In the first special count it is averred that plaintiffs were licensed real estate brokers in Chicago and defendant was the owner of the apartment building, located at the corner of 70th street and Oglesby avenue in said city; that on or about July 31, 1926, defendant listed the property for sale with plaintiffs and agreed that if they procured a purchaser he would pay to them the usual brokers' rates of commission, viz., 3 per cent on the purchase price; that "in the months of March and April, 1926," plaintiffs procured a "prospective purchaser" for the property, showed it to her and so notified defendant; that "as a result of their efforts" a sale of the premises was consummated to said

2071

ATTEST
J. H. HARRIS, Clerk
of the Court
of the County of
Alameda, California

WITNESSES
J. H. HARRIS, Clerk
of the Court
of the County of
Alameda, California

MR. JUSTICE UNITED STATES THE OFFICE OF THE COURT.

On a second day, 1911, and in March, 1911, as before

mentioned as that date, the Court, on the day, a
sale of defendant's apartment building in Chicago, there was a certain
the judgment against defendant and this appeal followed.

The first trial resulted in a verdict and judgment against
defendant, and on July 17, 1911, the judgment was reversed by this
court, on account of the finding of erroneous instructions which by
defendant, and the same was remanded. (Hill v. Hill, 201 Ill.

App. 631.)

Defendant's application consisted of two principal points and
the same were: In the first appeal, it is stated that plain-
tiff was licensed real estate agent in Chicago and had acted as the
agent of the apartment building, located at the corner of 7th Street

and Chicago Avenue in said city, that on or about July 15, 1911, defendant
told the property "we will sell plaintiff and agree that if they buy

under a contract he will pay to them the same amount, that is

remission, that is, he will pay to them the same amount, that is, the same

of cash and July 1911, plaintiff received a "proposition" from
the property, which is to say that he would sell the property, and

a result of which plaintiff, a sale of the property was consummated on July

557 I.A. 630

purchaser on or about May 26, 1926, at the price of \$150,000; that, however, the sale "was concealed from plaintiffs by reason of the fact that the premises were not conveyed directly to said purchaser but were conveyed to the West Englewood Trust & Savings Bank by a deed of trust for the benefit of said purchaser;" that thereby defendant, "in collusion with said purchaser and the bank," sought to, and did for many months thereafter, "keep plaintiffs in ignorance of the purchase of the premises;" and that defendant is indebted to plaintiffs in the sum of \$4500, being 3 per cent of the amount of the purchase price. In the second special count the averments are similar, except that plaintiffs are entitled to recover said sum as the "reasonable value" of their services. To the declaration defendant filed a plea of the general issue, and a special plea denying that plaintiffs procured a purchaser who was ready, able and willing to buy the premises upon terms agreeable to defendant, or that any sale was effected "as a result of plaintiffs' efforts," or that defendant "concealed" the sale as finally made, or that he "colluded" with the bank and the buyer so to do.

The principal contention of defendant's counsel is that the verdict and judgment are manifestly against the weight of the evidence on the question whether plaintiffs were the procuring cause of the sale. After considering all of the evidence introduced by the respective parties, as contained in the present transcript, we are of the opinion that there is substantial merit in the contention. We think that it is disclosed from a clear preponderance of the evidence that the sale was brought about by the negotiations and efforts of other real estate brokers in Chicago, H. F. Elmore & Co., and not by plaintiffs. It was finally consummated in the office of Elmore & Co. on May 26, 1926, at the price of \$149,800, - Miss Mary Maroney being the purchaser. It appears in substance that during July, 1925, defendant listed the

present on or about May 20, 1934. The price of 125¢ was paid, the same "was purchased from plaintiff by person on the spot" and the proceeds were not converted directly to said defendant but were conveyed to the "first defendant" through a "second defendant" for the benefit of said person only. The second defendant, the defendant, this said person and the person, would be the same person. Therefore, there plaintiff in favor of the purchase of the defendant and that defendant is entitled to plaintiff in the sum of \$125.00 being 2 per cent of the amount of the purchase price. In the second defendant found the amounts are similar, except that plaintiff's was entitled to recover said sum on the "second defendant's" value of their services. In the defendant defendant filed a plea of the general issue, and a special plea denying that plaintiff's purchase of defendant was a loan, and was willing to pay the proceeds upon demand of a loan, and that any such plea should be a denial of plaintiff's claim, or that defendant "conveyed" the said sum to said person, or that he "received" with the said sum and was paid as to do.

The principal contention of defendant's counsel is that the verdict and judgment are manifestly against the rights of the defendant on the question whether plaintiff was a loaner or a lender of the said sum. The defendant's counsel is also contented by the defendant's counsel, as contained in the present judgment, as one of the reasons that there is substantial equity in the defendant's claim that it is disclosed from a direct purchase of the defendant that the said sum was received by the defendant and others at about the same time in Chicago, N. Y. Illinois & Co. and not by plaintiff. It was further recommended in the office of Illinois & Co. on May 20, 1934, at the price of \$125.00 - this sum being being the purchase price. It appears in evidence that during July, 1934 defendant filed the

property for sale with plaintiffs' firm, at the solicitation of one of their salesmen, at the price of \$160,000; that defendant also listed the property about the same time with several other brokers; that in the fall of 1925, defendant authorized plaintiffs' salesman, William J. McCarthy, to sell the property for \$160,000; that during February, 1926, McCarthy presented it to Miss Maroney and on March 28, 1926, conducted her through the building; that on March 29th, plaintiffs, by McCarthy, wrote defendant that they had submitted the property to her, etc.; that a few days later she, accompanied by her brother, Patrick Maroney, and by McCarthy, further inspected the building; that shortly thereafter she told McCarthy that defendant's price of \$160,000 was too high but that she would consider buying the property at \$149,500; that McCarthy informed defendant of these negotiations, who told him that he would not take less than \$149,500 and for McCarthy to continue negotiations; that McCarthy did not thereafter push his negotiations further, and did not thereafter call upon or see defendant; that about the middle of April, 1926, Elmore & Co., by their salesman, Curtis and Hegley, commenced negotiations with Miss Maroney and defendant with the result that on April 27, 1926, Miss Maroney agreed to purchase the property for \$149,500 and made a deposit to that end of \$5,000; that through the efforts of said salesman of Elmore & Co., arrangements were made with the West Inglewood Trust & Savings Bank whereby Miss Maroney obtained from it a loan, and whereby the property, on May 26, 1926, was conveyed by defendant to it as trustee for her, and whereby said bank agreed to manage the building and collect the rents for her; that neither McCarthy nor any other of plaintiffs' agents participated in any of these negotiations; and that on November 10, 1926, the bank, as trustee, deeded the property to Miss Maroney. We find no evidence in the record showing any improper concealment on defendant's part, or any collusion or fraud on the part of defendant, Miss Maroney or the bank, as alleged in plaintiffs' declaration.

The judgment of the superior court should be reversed and the cause remanded, and it is so ordered.

REVERSED AND REMANDED.

Barnes, P.J., and Scanlan, J., concur.

33819

ADAMS CLARK BUILDING CORPORATION,
Appellee,

v.

ERNEST A. JACKSON and RICHARD S.
MORRIS,

Appellants.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

252 330

MR. JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

On July 1, 1929, after a hearing in open court before the chancellor, a decree was entered in complainant's favor, adjudging that a certain lease from complainant to Jackson, assigned to Morris, was fraudulent and void, and that it be removed as a cloud upon complainant's title; that within 30 days the defendants, Jackson and Morris, file with the clerk of the court the lease and assignment for cancellation; that neither of them has any right to possession of or interest in the premises, described in the lease and known as the "Bungalow" in complainant's building, and that they within 30 days deliver up the possession thereof to complainant; and that they, their agents and attorneys, and all persons under them, be enjoined from asserting any rights or claims, by suit or otherwise, adverse to complainant's rights and claims, from interfering in any manner with complainant's possession and enjoyment of the premises, and from assigning or attempting to assign the lease or any interest therein. Defendants have appealed.

In the decree the chancellor found that complainant is an Illinois corporation, incorporated in June, 1926, and is the owner of a leasehold estate in certain land at the southwest corner of Adams and Clark streets, Chicago, and of a certain building thereon, known as the Banker's Building; that certain premises on the 40th and 41st floors of the building, which are the uppermost stories, are known as the "Bungalow;" that defendant, Jackson, from the incorporation of complainant and until November 30, 1926, was its president; that

RECEIVED BY THE DIRECTOR, FBI, WASHINGTON, D.C.

DATE: 10/10/50

TO: SAC, NEW YORK

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RE: [Illegible]

On July 1, 1950, [Illegible]

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while so acting he, as such president and on behalf of complainant as lessor, executed a lease of the premises to himself, as lessee, under date of October 26, 1927; that it was for the term of 10 years from December 1, 1927, and the total rent reserved was \$12,000, payable at the rate of \$100 a month; that the rent is "grossly inadequate;" that the true rental value of the premises at the time of the execution of the lease was, and now is, \$500 a month, or \$60,000 for the entire term; that Jackson, as president or otherwise, "had no authority to execute such lease to himself or to bind complainant thereto;" that "its execution was not authorized by the Board of directors of complainant and that it was and is a fraud upon complainant and is fictitious and void and a cloud upon complainant's title to the premises;" that on June 1, 1928, Jackson on behalf of, and in the name of, complainant wrote to himself, as lessee, saying that "rentals on the space demised by said lease will begin on June 1, 1928, the date when said space was completed for full occupancy; please attach this letter to your lease;" that he had no authority, either as president or otherwise, to write the letter, and the same was not authorized by the board of directors of complainant; that on November 15, 1928, he, as lessee, made a purported written assignment of the lease to defendant, Morris, who accepted the same; that complainant did not consent to the assignment nor was it authorized by its board of directors; that Morris, when he accepted it, was charged with notice of the facts and circumstances attending the execution and delivery of the lease to Jackson and that it was fictitious and void; that no rent was paid on account of the lease by Jackson, Morris or anyone, except that about November 23rd, while Jackson was still acting as president of complainant and in control of its affairs, Morris caused to be paid into complainant's treasury \$100 on account of rent, without the knowledge or consent of said board of directors; that on November 30, 1928, by resolution of said board of directors, Jackson was removed as president and director of complainant; that on December

3rd the Board passed a resolution, at a meeting duly called, etc., wherein it was stated that the making of the lease by Jackson on behalf of complainant to himself, as lessee, "has recently come to the attention of the Board," and that "the Board has just been informed" that the purported lease bears Jackson's written assignment to Morris, and wherein it was "resolved" that the company tender back to Morris said \$100 so received for rent, and the company's counsel be instructed to take such steps as may be by them deemed proper to cancel and annul the purported lease and the assignment; that on December 4th, complainant, by its treasurer, enclosed in a letter to Morris \$100 in currency; that Morris refused to accept the money and on the same day returned it; that complainant is at all times ready and willing to pay to Morris said sum with interest; and that Morris is now in possession of the premises, claiming to hold them under the purported lease and the assignment, and refuses to surrender possession of the premises to complainant.

Complainant's bill was filed on December 20, 1928, to which was attached as an exhibit a copy of the lease. After making allegations, in substantial accord with the findings of the court as above outlined, the bill prayed that said lease, as well as its assignment to Morris, be decreed to be fraudulent as to complainant and to be null and void; that the same be cancelled; that the possession of the premises be given to complainant, and that Jackson and Morris, their agents and attorneys, be enjoined, etc. Each of the defendants filed an answer to the bill, and on May 8, 1929, each filed an amendment to the answer, in substantially the same language, in which it is alleged that on and prior to the date of the lease (October 26, 1927,) the stockholders of complainant were Jackson, Jerome F. Hages, C. E. Adams, Frank Stevens, L. L. Drumheller, Adolph Sterner and Jess Halsted; that the stock standing in the names of Stevens, Drumheller,

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sterner and Halsted was actually the property of Jackson; that Adams was an employe of F. W. Chapman & Co., which was actually the owner of the stock standing in his name; that Magee and Chapman & Co. consented to the making of the lease to Jackson; that all of the stockholders, having any beneficial interest in the corporation, either "authorized or acquiesced in the lease;" that the rental reserved therein was fixed by the stockholders other than Jackson and upon his insistence that he did not care to have the lease without payment of a rental to be fixed by such other stockholders; that on February 9, 1928, at a meeting of the Board of Directors, Jackson submitted to the meeting a list of tenants and the space rented up to that date, which included the said lease to him; that on March 19, 1928, at another meeting of the Board, a firm of public accountants employed by complainant submitted an audit report showing the leasing of the premises in question to Jackson and the annual rent therefor; that the lease "was known and assented to by all of the stockholders of complainant continuously from its date and prior thereto;" that at the meeting of December 3, 1928, when the Board of Directors by resolution directed the institution of the present suit to set aside the lease, the directors of complainant were Messrs. Dilks, Harker, Halsted, Glass and Rigney; that Harker was then, and had been during October, 1927, vice president of Chapman & Co., and had represented it in its dealings with complainant, and, as such vice-president, had authorized and acquiesced in the lease to Jackson; and that said five directors had acquired the stock of those stockholders who had, prior to the transfer of the stock, authorized, consented to and acquiesced in said lease.

The lease in question is on a printed form, which contained the usual provisions, and the blanks are filled out in typewriting. But many of the printed provisions, particularly those intended for the protection of the lessor, are erased by the drawing of ink lines

through them. The following clauses are crased: (a) the clause prohibiting the lessee from assigning the lease or subletting any part of the premises without the lessor's written consent; (b) that the lessee will not use the premises for lodging or sleeping purposes; (c) authorizing the lessor to terminate the lease if the building is sold or remodeled; (d) providing that if there be default in payment of rent, the lessor may terminate the lease without notice and re-enter; (e) entitling the lessor to have a receiver appointed in the event of foreclosure of the lien for rent; (f) providing for payment of double rent as liquidated damages for the time the lessee shall retain possession of the premises after the termination of the lease by lapse of time or otherwise; and (g) providing for confession of judgment for rent due. Other usual clauses are crased.

The evidence shows that the making of the lease was never authorized, or ratified by complainant's board of directors at any meeting. There was some discussion regarding a different lease for five years of the premises to Jackson at a meeting on October 1, 1927, when only Jackson and one other director were present. The lease was never again discussed at a director's meeting until the meeting of December 3, 1928, when action was taken to annul it as found by the court. This action occurred three days after Jackson had been removed as a director and changes were made in the membership of the board. There is a rider attached to the lease, of the same date as the lease (October 26, 1927), signed by complainant, by Jackson as president, and by Jackson, individually, in which it is stated: "The lease to which this rider is attached was executed in accordance with the terms and conditions and for the rentals provided by an action of the Board of Directors of the Adams-Clark Building Corporation, in which action Ernest S. Jackson took no part." Jackson testified on cross examination that he wrote the rider and that the above statement therein "was not true."

Defendants do not claim that Morris, as assignee of the lease, was an innocent purchaser for value, or that complainant's right in equity to have the lease set aside and cancelled was in any way affected by the assignment to Morris.

Defendants' position is in effect that the findings and decree of the court are against the weight of the evidence on the questions whether Jackson was authorized by complainant to execute the lease, and whether the lease, if not authorized, was ratified and acquiesced in by complainant. Defendants' counsel in their brief make the following contentions: (a) That Jackson, as president of complainant, was fully authorized by the directors and stockholders of complainant to execute the lease to himself; (b) that the lease and Jackson's occupancy of the premises was known, ratified and consented to by all of the stockholders; (c) that the rent specified in the lease was adequate for the space leased; and (d) that the suit is not brought in good faith. After a careful review of the voluminous evidence we cannot agree with any of these contentions. We think that the findings and decree of the court are amply sustained by the evidence. No useful purpose will be served in a detailed discussion of the testimony of the numerous witnesses. And we think that the evidence is such as discloses that the lease was a fraud upon complainant and voidable at its option, and that defendants' defense of acquiescence by complainant in the lease was not maintained by a preponderance of the evidence.

The decree of the superior court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

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33852

FRANK J. HOPKINS,
Appellee,

v.

CARLOS AMES, ARCHIBALD
J. CAREY and EDWARD J.
BRENNAN, as Civil Service
Commissioners of the City
of Chicago,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

257 L.A. 330⁴

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

On May 1, 1929, Frank J. Hopkins filed a verified petition in the Superior Court of Cook County praying that the court order the issuance of a writ of certiorari, directed to the members of the Civil Service Commission of the City of Chicago, as respondents, commanding them to certify and bring up a complete record of the proceedings of the Commission in the matter of the hearing of certain charges and specifications against petitioner, which resulted in his discharge from his position as a patrolman in the department of police of the city; that said record of the Commission be quashed; and that said order of petitioner's discharge be set aside. On May 2nd the court ordered that the writ issue, and on May 9th respondents made a return and therein certified to a record of the proceedings, which, however, did not contain a transcript of the evidence heard upon the trial before the Commission. On the same day respondents moved to quash the writ, etc. A hearing was had on May 10, 1929, during which the court ordered the return instanter of said transcript of the evidence, which respondents immediately in open court returned. Thereupon the Court entered the final order or judgment appealed from, overruling respondents' motion to quash the writ, sustaining petitioner's motion to quash

0-253-223

• *Calligraphy* • *Art*

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

On May 1, 1967, the Commission on the Assassination of President John F. Kennedy held its first public hearing. The Commission was composed of seven members, including the Chairman, Warren E. Hearnes, and six other members. The Commission's mandate was to investigate the assassination of President Kennedy and to report its findings to the public. The Commission's first public hearing was held in the Senate Chamber of the United States Capitol Building in Washington, D.C. The hearing was attended by a large number of people, including members of the press, members of the public, and members of the Commission. The Commission's first public hearing was a significant event in the history of the Commission, as it marked the first time that the Commission had held a public hearing. The Commission's first public hearing was a success, and it was well-received by the public. The Commission's first public hearing was a significant event in the history of the Commission, as it marked the first time that the Commission had held a public hearing. The Commission's first public hearing was a success, and it was well-received by the public.

the record of the Commission, finding that "there is not a scintilla of evidence to sustain the finding of the Civil Service Commission on the charges preferred and the order of discharge thereon entered," and adjudging that "the record of said Commission, discharging petitioner from his civil service position as patrolman in the police department of the City of Chicago, be and the same is hereby quashed, and for naught set aside." There is no bill of exceptions contained in the transcript of the record. No brief has been filed in this court by petitioner.

From the record of the Commission, as returned to the writ and certified by respondents, it appears that on June 11, 1927, written charges together with specifications were preferred by Michael Hughes, Superintendent of Police, against petitioner and filed with the Commission (said charges and specifications being set out in full); that on June 16, 1927, petitioner received written notice that the charges, etc. (copy thereof, together with the names and addresses of eight witnesses, being attached to the notice) had been preferred against him, and that a hearing thereon had been ordered to be held in Room No. 613, City Hall, Chicago, on June 22, 1927, at 10 o'clock A. M.; that the hearing was continued from time to time until August 3, 1927, when the case was taken under advisement; and that on August 13, 1927, the Commission found petitioner guilty of certain of the charges preferred and ordered that he be discharged from his said position.

The "findings and decision" of the Commission are set forth in full in said record, and therein it is stated that on August 3, 1927, the Commission, as to said charges, "proceeded to hear testimony of the witnesses, a record of which is preserved and on file in the office of the Commission," and that the charges were as follows:

the record of the Commission, finding that "there is not a reliable
of evidence to establish the finding of the Civil Service Commission
on the charges preferred and the want of adequate support, stated,"
and regarding that "the record of said Commission, demonstrating
petitioner from his civil service position as provided for the
Police Department of the City of Chicago, he was not to be
removed, and for reasons apparent." There is no bill of particulars
submitted in the proceedings of the record. He did not even file
in this court by petitioner.

From the record of the Commission, as returned to the
file and certified by respondent, it appears that on June 11,
1937, certain charges against the petitioner were preferred
by Michael Higgins, representative of Union, against petitioner
and filed with the Commission (said charges and proceedings
being set out in full) that on June 15, 1937, petitioner was
advised orally that the charges, that he should, together with
the names and addresses of eight witnesses, which appeared in the
petition and some evidence against him, and that he had twenty
days within which to be held in New York City, New York.
On June 17, 1937, at New York City, he was notified that he
should come to the New York City Court House, New York City, for
further action and that he should appear on June 17, 1937, the Commission
then, petitioner failing to appear at the hearing conducted and
stated that he is a Chicago man and his residence
The findings and findings of the Commission are set
forth in full in the record, and further it is stated that on
June 2, 1937, the Commission, as in said charges, proceeded to
first testimony of the witness, a record of which is preserved and
on file in the office of the Commission, and that the charges were
as follows:

"Violations of Rule 236, and the following sections of Rule 239, Rules and Regulations of the Department of Police, promulgated and in force December 15, 1924, viz:

1. Rule 236: Right to entertain Political Opinions. The right of members of the Department to entertain political opinions and the right of elective franchise is sacred and inviolate, but no members shall be delegates to or members of any political or partisan convention, nor shall they take part in any political campaign, nor make or solicit contributions to any political party, club or association, or for any political purpose.

2. Section 3, Rule 239: Conduct unbecoming a police officer or employee of the Police Department.

3. Section 5, Rule 239: Neglect of duty.

4. Section 10, Rule 239: Incapacity or inefficiency in the service."

Two of the four specifications relate to the claimed violations of said Rule 236. (as to which the Commission made no findings) and the other two specifications are as follows:

"3. In that the said patrolman Frank J. Hopkins of the 28th District did permit and suffer houses of prostitution to be operated in said 28th District, Department of Police, City of Chicago, and also did permit solicitation and roping for prostitution on the streets of the City of Chicago, in said 28th Police District, on April 30, 1927, and May 21, 1927, and at divers other times between said dates, and at various places in said district, to-wit: 53 West Grand Avenue, 69 West Ohio Street, 113 West Grand Avenue, 203 North Clark Street, 347 Rush Street, 548 Rush Street, 36 West Grand Avenue, 838 North Clark Street, 111 West Austin Boulevard, 151 West Erie Street, 12 West Grand Avenue, 528 North Dearborn Street, 542 North Dearborn Street, and 600 North Clark Street.

4. In that the said patrolman Frank J. Hopkins of the 28th District did show inability and inefficiency to prevent prostitution in the district to which he was assigned, and inability and inefficiency to stop and prevent solicitation and roping on the street in the district to which he was assigned at the times and in the places stated in specification hereof No. 3."

The Commission further found in its "Findings and Decision" that Hopkins appeared in person at the hearing and was represented by counsel; that both participated in the examination of witnesses; that he was a patrolman in the department of police of said City on June 10, 1927; and that "from a consideration of all the evidence before it the Commission finds said Frank J. Hopkins guilty of the following:

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

2. The second of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

3. The third of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

4. The fourth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

5. The fifth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

6. The sixth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

7. The seventh of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

8. The eighth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

9. The ninth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

10. The tenth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

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Violation of the following sections of Rule 289, Rules and Regulations of the Department of Police, promulgated and in force December 15, 1924, viz:

3. Conduct unbecoming a police officer or an employee of the Police Department;

5. Neglect of duty;

10. Incapacity or inefficiency in the service.

In that the said Frank J. Hopkins, patrolman, 28th district, did permit and suffer houses of prostitution to be operated in said 28th district, Department of Police, City of Chicago, and also did permit solicitation and roping for prostitution on the streets of the City of Chicago, in said 28th police district, on April 30, 1927, and May 20, 1927, and at divers other times between said dates, and at various places in said district, to-wit: 55 West Grand Avenue, 49 West Ohio Street, 112 West Grand Avenue, 603 North Clark Street, 547 Rush Street, 545 Rush Street, 58 West Grand Avenue, 518 North Clark Street, 111 West Austin Boulevard, 131 West Erie Street, 13 West Grand Avenue, 518 North Dearborn Street, 542 North Dearborn Street, and 408 North Clark Street.

In that the said Frank J. Hopkins did show inability and inefficiency to prevent prostitution in the district to which he was assigned, and inability and inefficiency to stop and prevent solicitation and roping on the street in the district to which he was assigned at the times and in the places stated in specifications heretofore No. 3.

Therefore, the Civil Service Commission finds the said Frank J. Hopkins guilty of -

Conduct unbecoming a police officer or an employee of the Police Department;

Neglect of duty; and

Incapacity or inefficiency in the service."

In Yunkhouser v. Coffin, 301 Ill. 157, 260-1, it is said:

"The only office which this writ (certiorari) performs is to certify the record of a proceeding from an inferior to a superior tribunal. The superior tribunal, upon an inspection of the record alone, when the return is sufficient, 'determines whether the inferior tribunal had jurisdiction of the parties and of the subject matter, and whether it has exceeded its jurisdiction, or has otherwise proceeded in violation of law.' " The record must show facts giving the inferior tribunal jurisdiction, and mere conclusions of law are not sufficient." (Bohnenkamp

Hospital v. Industrial Board, 262 Ill. 316.) There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction. Nothing is taken by intendment in favor of such jurisdiction but the facts upon which the jurisdiction is founded must appear in the record. " 'A quasi judicial tribunal of inferior jurisdiction must recite the facts, or preserve the facts themselves, upon which its jurisdiction depends.' " (Troxell v. Dick, 216 Ill. 98.) " " Then the proceedings that are being heard are summary, without the right of trial by jury, and there is no right of appeal, 'it is necessary that for purposes of review the substance of the evidence should be given and not the conclusions drawn therefrom.' " (Mawicki v. Keron, 79 N. J. L. 382.)"

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Tested by these holdings and decisions we think that the trial court in the present case was fully warranted in entering the judgment that was entered. It will be noticed that the findings of the Commission, as contained in its "findings and decision," relative to Hopkins' permitting and suffering houses of prostitution to be operated in said 18th district and relative to his inability and inefficiency to prevent prostitution in said district, are in almost the identical language as in specifications Nos. 3 and 4 accompanying the charges; and that no facts are stated in the Commission's findings, showing wherein or how he permitted prostitution to be operated in said district, or wherein or how he was unable to prevent or inefficient in preventing such prostitution, or that he had knowledge that prostitution existed at the times and places named. And, as the transcript of the testimony taken before the Commission was before the trial court but is not contained in the present transcript of the record, we must presume that the Commission's transcript of said testimony justified the finding of the court that there was "not a scintilla of evidence" contained therein that sustained the charges against petitioner or his discharge from his position.

The judgment of the Superior court is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

[illegible]

* Publisher: J. C. Mortimer, Inc., 435 N. 3rd St., St. Paul, Minn.

33890

FITZGERALD CONSTRUCTION CO.,
a corporation,
Complainant and Appellee.

v.

OTTO A. ALTSCHUL et al.,
Defendants

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

2571A 631

OTTO A. ALTSCHUL,
Appellant.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal Otto A. Altschul seeks to reverse a decree of the circuit court of Cook county, entered May 14, 1929, wherein complainant, an original contractor, was awarded a mechanic's lien on the building and premises known as 1542-1244 North Dearborn street, Chicago, in the sum of \$21,515.88, together with legal interest from July 1, 1924, and costs of suit, including the fees and charges of the master. And the court decreed that unless within three days Altschul or some of the defendants pay said amounts to complainant, the premises be sold subject to the lien of a certain trust deed, dated January 25, 1923, (except as to the sum of \$5,000 secured thereby), etc.

In complainant's original bill, filed July 24, 1924, the building contract, dated April 25, 1923, between complainant (designated as contractor) and Altschul & Company (designated as owner) was attached as an exhibit and made a part of the bill. It is stated in the contract that the contractor agrees to provide complete "all the materials and perform all the work for the excavation, piling, shoring, plain and re-enforced concrete, masonry and partitions, cutstone, terra cotta, and granite," on the building to be erected on the premises, "as described in the specifications

2541A.031

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By this report this is to certify that the
above of the clients work of each company, including any in, 1964,
wherein was included, an original copy, was received
according to the bill on the building and purchase known as 2541A-031
North Western Street, Chicago, in the sum of \$25,000.00, payable
with legal interest from July 1, 1964, and costs of legal action.
and the fees and charges of the master, and also your account
that unless within three days thereof or some of the balance
pay said account be repaid, the purchase is void, subject to
the firm of a certain firm, 1964, 1964, 1964,
as in the sum of \$25,000.00 (Twenty Five Thousand Dollars), and
in a certain bill, dated July 1, 1964,
the building contract, dated July 1, 1964, between the
(designated as contractor) and (designated as building)
order, was included as an exhibit and made a part of the bill.
It is stated in the contract that the completed work is to be
complete "all the materials and parts all the work for the
construction, finish, electrical, plumbing and mechanical, including
and painting, masonry, and heating, and lighting, and the building
to be erected on the premises, as described in the specifications

and shown on the drawings prepared by E. E. Lechlager, Inc., Architect," and to do "to the satisfaction of O. A. Mitschul, owner, and of the architect," everything required of it by the general conditions, specifications or drawings; that the work is to start immediately and "the concrete and masonry is to be completed October 1, 1923;" that the owner "agrees to pay to the contractor for the performance of the contract the total sum of \$215,000, but only upon certificates, signed by the architect and the owner;" that during the progress of the work partial payments upon certificates are to be made to the contractor, on or before the 10th day of each month, to the extent of 85 per cent of the value of the labor and materials furnished up to the first day of that month, as estimated by the architect, less previous payments; that upon the satisfactory completion of the entire work, there shall be paid to the contractor a sum sufficient to increase the total payments to 85 per cent of the value of the entire work; that within 30 days thereafter the balance shall be paid, but in no case shall the contractor be entitled to a payment which, in the judgment of the architect, will leave the balance withheld insufficient to complete the work; that the general conditions, specifications and drawings, together with this contract, are to be considered as parts of the entire contract; and that both parties agree that they will be bound by the documents and that "they will promptly and fully carry out all decisions of the architect or arbitrators given thereunder."

Among the numerous "general conditions" are that "no alterations, changes, additions or other revisions are to be made unless an order has been given in writing by the architect, and, unless such order is given, no contractor shall receive compensation for any work that might be done other than that shown on the plans or called for in the specifications;" and that "all materials and

[illegible]

appliances shall be furnished, and all labor performed, under the terms and conditions of the award and recommendations of the arbiter, Judge Kenesaw M. Landis (award dated September 7, 1921), and in case the contractor at any time refuses or neglects to comply with said terms, conditions and recommendations, the owner may terminate this contract," etc.

In the original bill complainant alleged that it had fully performed and completed the contract in June, 1924; that the price was \$215,000; that it had also furnished extra work and materials (itemized statement attached) aggregating \$13,189.75; that it had received payments on the contract from time to time, aggregating \$203,500, which, with certain credit allowances amounting to \$1,203.27, made a total credit of \$203,703.27; that there was a balance due to it of \$29,465.43, for which it claimed a mechanic's lien; and that on July 3, 1924, it filed a statement of its claim for lien (copy attached) with the clerk of the circuit court of Cook county, in compliance with the statute. On June 12, 1925,

an amendment was made to the bill in which complainant alleged that it furnished all materials and performed all work as required; that, as to the "concrete and masonry," that particular work was not completed on October 1, 1923, but was completed on February 13, 1924; that after October 1, 1923, Altachul caused to be made to complainant from time to time nine partial payments aggregating \$163,500, the last one for \$5,000, on May 27, 1924; that it completed all of the work required by the contract on June 9, 1924, and Altachul accepted the building, took possession and is now using the same for the purposes for which it was erected; that because of these payments and his acceptance of the building he waived the provision of the contract that the concrete and masonry work should be completed by Altachul October 1, 1923; that on July 15, 1924, complainant demanded of /

agreement shall be furnished, and all other matters, which the
terms and conditions of the contract and the provisions of the
agreement, shall be subject to the provisions of the
and in case the contract is not entered into, the contract
comply with laws, regulations and administrative, and every
other law, regulation, and administrative, and every

In the original bill complaints alleged that it was being
permitted and completed the contract in 1934, that the total
was \$115,000; that it had also furnished other work and materials
(estimated at \$100,000) (estimated at \$115,000); that it
had received payments on the contract from 1934 to 1935, amounting
to \$100,000, which, with certain credit allowances amounting to
\$1,000.00, made a total credit of \$101,000.00; that there was a
balance due to it of \$14,000.00; that which is claimed a monetary
claim; and that on July 1, 1935, it filed a statement of its claim
for the (copy attached) with the clerk of the circuit court of
Cook County, in compliance with the statute. On June 11, 1935,
an amendment was made to the bill in which complaints alleged
that it furnished all materials and payments all work in 1934;
that, as to the "contract" and "agreement," that it furnished work and
materials on October 1, 1934, but was completed on February 1, 1935;
that after October 1, 1934, it had no work to complete;
from time to time since that date payments amounting to \$100,000, the
last one for \$10,000, on July 1, 1935; that it completed all of the
work required by the contract on June 1, 1935, and it had no work
left to do, and it was paid for the work, and it was paid for the work
and it was paid for the work, and it was paid for the work, and
the completion of the contract he waived the provision of the
contract that the contract was subject to the provisions of the
contract. That on July 1, 1935, complaints demanded of

and the architect that they issue to it a final certificate, but that they, acting in furtherance of a conspiracy to cheat and defraud complainant, fraudulently withheld and refused to issue such certificate; that they untruthfully stated at the time that the building had not been completed in accordance with the contract, that the work had not been well done, and that the materials furnished were not merchantable; that they well knew that the contrary was the fact; and that the contract was fully completed in accordance with its terms and the plans and specifications and also extra work and materials were furnished. Subsequently the bill was further amended by adding a clause to the effect that all extra work and materials, as listed in the attached statement "were ordered by said Altschul or his architect."

To the bill as finally amended Altschul demurred generally and specially, but the court overruled the demurrer, and subsequently Altschul filed his answer admitting the making of the contract, that part of the required work had been done, that from time to time during its progress architect's certificates were issued and payments made to complainant aggregating \$202,500, but that no final certificate had been issued. He denied that he had waived the completion of the concrete and masonry work by October 1, 1923; that all the extra work as claimed had been performed, or that written orders had been given either by him or the architect ^{for} all of the same; and that neither on July 18, 1924, nor at any other time, had any demand been made upon him or the architect for the issuance of a final certificate, or that either had refused to issue the same, or that they had fraudulently conspired not to issue it, etc. He alleged that by reason of the delay in the completion of the concrete and masonry work, and other required work, and by reason of certain faulty work, he had been damaged to the extent of \$25,000; that certain changes had been made

and the evidence in the case is in a state of confusion, and

that they, acting in furtherance of a conspiracy to defraud and

obtain commissions, fraudulently obtained and retained as agents

and commission agents they fraudulently obtained of the same firm

the building had not been completed in accordance with the con-

tract, that the work had not been well done, and that the materials

furnished were not satisfactory; that they were well known and the con-

tract was the fact; and that the contract was fully completed in

accordance with the terms and the plans and specifications and the

plans were and materials were furnished, respectively, but still the

contract was not completed by making a change in the plan of the

work and materials, as stated in the evidence submitted, were ordered

for this building at the building.

To the bill as finally amended, I would recommend generally

and especially, that the court consider the contract, and especially

therein stated the amount admitted the making of the contract, that

part of the contract work had been done, that from time to time during

the progress of the work the contract was being carried out, and

in compliance with the contract, that, that is, that the contract

had been made. He further stated he had never the completion of the

contract and money was by contract, that the contract was not

as stated had been performed, as that contract was not been

either by him or the architect, that the contract was not been

July 15, 1904, nor at any other time, but only during the time

that the architect for the building of a final certificate, as that

they had refused to issue the same, or that they had fraudulently

concluded not to issue the same. He stated that by reason of the

delay in the completion of the contract and money was, and other

negative work, and by reason of certain facts, as that work

was not in the contract of the contract, that the contract was not

as the work progressed whereby the cost of the entire work had been reduced from the contract price to the extent of \$10,000, for which he was entitled to a credit; that he is not indebted in any sum to complainant; and that it is not entitled to a mechanic's lien in any amount.

On July 27, 1925, after replication filed, the cause was referred to a master to take proofs and report his conclusions of law and fact. A mass of evidence was introduced. The principal witness for complainant was Fred J. Holmes, who during the entire work had acted as superintendent of construction for complainant and who was constantly on the job. His testimony was taken under a stipulation of the parties by deposition on oral interrogatories on October 7, 1925, at Miami, Florida, where he then was residing temporarily. Notwithstanding the fact that the deposition had been taken by agreement and that at Miami Holmes was exhaustively cross-examined by Altschul's counsel, Altschul shortly after the return of the deposition filed a petition to suppress it in its entirety on the grounds that Holmes at the time was really a resident of Cook county, Illinois, that Altschul when he consented to the taking of the deposition did not know of that fact, and that under the provisions of section 28 of the Evidence & Depositions Act the taking of a deposition on oral interrogatories is limited to a "non-resident" witness. The court denied the petition. Before the master, A. J. Fitzgerald and J. G. Fitzgerald, respectively president and secretary of complainant, and several other witnesses, testified in its behalf. A. J. Fitzgerald had generally supervised the work on the building as it progressed. Altschul was a witness in his own behalf, and Willard Dowd and Joseph Bulfeld, respectively vice president and superintendent of the architect, F. W. Alschlager, Inc., and several other witnesses, testified for him. Many documents

and writings were introduced by the parties.

In the master's report, dated November 30, 1927, and filed June 29, 1928, after making many findings, he recommended the entry of a decree for a mechanic's lien upon the premises in complainant's favor for the sum of \$17,515.22, with legal interest from July 1, 1924. Altschul's objections were ordered to stand as exceptions before the court. On the hearing on the exceptions the court confirmed the master's report except as to said amount, reducing it to the sum of \$21,515.22, and entered the decree as first above mentioned. Complainant has here assigned three errors, claiming that the court erred in making any reduction from the amount as recommended by the master.

Among the master's findings are that, while complainant did not complete the "concrete and masonry" work by October 1, 1923, as provided, there were "unavoidable delays over which complainant had no control" and Altschul is not entitled to any allowance on this account; that the entire work under the contract was substantially completed on February 12, 1924, except "certain comparatively small matters which needed attention" and which were finally finished during May, 1924; that in addition to doing the work, as provided in the contract and specifications, complainant did extra work and furnished extra materials, as per signed orders of the architect or owner, in the aggregate amount of \$11,809.95 (itemized in the report) including the furnishing of additional concrete throughout the building and including overtime labor (this aggregate sum was reduced by the court in the decree to \$5,809.95); that complainant also did further extra work as per orders received, in the aggregate sum of \$3,205.27 (itemized in the report); that from time to time complainant received certificates and payments on the contract aggregating \$202,500, leaving a balance due thereon of \$12,500; that the total of these three sums is \$27,515.22, for

... ..

Page 2341 of 2341

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at least one of such self-administered test scores as to time and

Approved: _____ Date: _____

From July 1, 1964, to August 1, 1964, the following information was obtained from the records of the Federal Bureau of Investigation:

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on receipt of the following sum - \$2,000.00 to run and as it shall appear

... ..

J. L. Thompson et al.

*This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

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Submitted: 10/10/2011, 11:00 AM

For further information, please contact: info@hugoboss.com

Finally, I visited during May, 1964, and in addition to taking

652 is provided in the context and caption, respectively.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

THE STATE OF NEW YORK

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the results of its investigation into the activities of the British Security Organisation in the United States.

which complainant is entitled to a mechanic's lien; that of said sum of \$202,500, paid to complainant under the issued certificates, \$162,500 thereof was paid after October 1, 1923, - the last payment being on May 27, 1924; that during the month of June, 1924, and early in July 1, 1924, several meetings were had between the two Fitzgeralds, representing complainant, and Altschul and William Dowd, vice president of the Architect, at which meetings the Fitzgeralds urged the immediate issuance of a final certificate and the payment of the balance due; that under the contract all certificates were to be signed by both the architect and Altschul; that it was their duty to issue such final certificate for such sum as they believed to be due to complainant, but that both refused, arbitrarily, capriciously, and without any good cause, to issue a final certificate; and that on July 8, 1924, complainant filed its statement of claim for lien, in due form and in apt time, with the clerk of the circuit court, in accordance with the statute, and shortly thereafter commenced the present suit.

The master further found that Leight-Holzer & Co. of Chicago, made a loan upon the premises for the purpose of aiding Altschul in the construction of the building; that this loan was secured by a trust deed on the premises dated January 25, 1923; that from time to time, as certificates were issued, payments were made by Leight-Holzer & Co. out of the proceeds of the loan in its possession or control; that the last certificate issued to complainant is dated May 27, 1924, and is for the sum of \$5,000; that Leight-Holzer & Co. paid complainant said sum a few days thereafter and there remained in the hands of Leight-Holzer & Co., of the proceeds of the loan, a balance of \$5,000; that on February 12, 1924, complainant received a certificate for \$12,000, signed by the architect (by Dowd) and by the owner (Altschul); that this

certificate, No. 5, was directed to Leight-Holzer & Co., and certified that "Fitzgerald Const. Co., contractor for the gen. concrete and masonry work on the building, et etc., is entitled to a payment of \$15,000, to be charged to the loan made by you on the above property;" and that by virtue of this certificate complainant received from Leight-Holzer & Co. said amount of \$15,000 on said date. This certificate No. 5 was introduced in evidence on the hearing. On the back are the following receipt and waiver of lien, both signed by complainant:

"Chicago, Illinois, 2/12/1924. Received of Leight-Holzer & Co., the amount of the within certificate. All labor and materials furnished under the within described contract prior to the date of this certificate have been paid for in full.
(Signed) Fitzgerald Construction Co.
by J. G. Fitzgerald, Sec'y."

"State of Illinois)
County of Cook) ss. To all whom it may concern: Whereas we, the undersigned, Fitzgerald Const. Co. have been employed by Otto A. Altschul to furnish labor and material for masonry, concrete and piles work for the building, known as 1244 N. Dearborn street, Chicago, Cook County, Illinois. Now, Therefore, Know Ye, that we, the undersigned, for and in consideration of one dollar, and other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby waive and release any and all lien, or claim, or right of lien on said above described building and premises under 'an Act to Revise the Law in relation to Mechanics' Liens, approved May 18, 1903, and in force July 1, 1903,' on account of labor or materials, or both, furnished to Feb. 12th, 1924, by the undersigned to or on account of the said _____ for said building or premises.

Given under our hand and seal this 12th day of Feb. 1924.
(Signed) Fitzgerald Construction Co. (seal)
by J. G. Fitzgerald (seal)"

The evidence does not disclose that complainant at any time subsequent to February 12, 1924, or when it received the \$5,000 payment by virtue of said certificate of May 27, 1924, signed any further waiver of lien. The master found, as to said certificate No. 5 that the same "show a complete waiver of lien by the Fitzgerald Construction Co. to February 12, 1924." Notwithstanding this finding, and his further finding (above mentioned) that all work under the contract (i.e. exclusive of extra work ordered) had been

CONFIDENTIAL - This document contains information which is exempt from public release under the provisions of the Freedom of Information Act, 5 U.S.C. 552, and is to be controlled, stored, handled, transmitted, and disposed of in accordance with the provisions of the Department of Defense Information Security Manual, 128.101, and the Department of Defense Information Security Manual, 128.102. This document is to be controlled, stored, handled, transmitted, and disposed of in accordance with the provisions of the Department of Defense Information Security Manual, 128.101, and the Department of Defense Information Security Manual, 128.102.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Security Establishment in the United States.

1. The first part of the document is a letter from the President of the United States to the Secretary of the Navy, dated 1890. The letter is signed by William McKinley and is addressed to John D. Long. The letter discusses the appointment of a new Secretary of the Navy and the importance of the position.

2. The second part of the document is a letter from the Secretary of the Navy to the President, dated 1890. The letter is signed by John D. Long and is addressed to William McKinley. The letter discusses the appointment of a new Secretary of the Navy and the importance of the position.

3. The third part of the document is a letter from the Secretary of the Navy to the President, dated 1890. The letter is signed by John D. Long and is addressed to William McKinley. The letter discusses the appointment of a new Secretary of the Navy and the importance of the position.

4. The fourth part of the document is a letter from the Secretary of the Navy to the President, dated 1890. The letter is signed by John D. Long and is addressed to William McKinley. The letter discusses the appointment of a new Secretary of the Navy and the importance of the position.

5. The fifth part of the document is a letter from the Secretary of the Navy to the President, dated 1890. The letter is signed by John D. Long and is addressed to William McKinley. The letter discusses the appointment of a new Secretary of the Navy and the importance of the position.

6. The sixth part of the document is a letter from the Secretary of the Navy to the President, dated 1890. The letter is signed by John D. Long and is addressed to William McKinley. The letter discusses the appointment of a new Secretary of the Navy and the importance of the position.

7. The seventh part of the document is a letter from the Secretary of the Navy to the President, dated 1890. The letter is signed by John D. Long and is addressed to William McKinley. The letter discusses the appointment of a new Secretary of the Navy and the importance of the position.

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9. The ninth part of the document is a letter from the Secretary of the Navy to the President, dated 1890. The letter is signed by John D. Long and is addressed to William McKinley. The letter discusses the appointment of a new Secretary of the Navy and the importance of the position.

10. The tenth part of the document is a letter from the Secretary of the Navy to the President, dated 1890. The letter is signed by John D. Long and is addressed to William McKinley. The letter discusses the appointment of a new Secretary of the Navy and the importance of the position.

The evidence then was directed to the completion of the
the evidence of February 12, 1944, as then it was the 12, 1944,
evidence by virtue of this certificate of May 17, 1944, which was
evidence of them. The matter then, as in this certificate
the 12, 1944, the same "after a complete review of them by the
Commissioner of the Department of the Interior, Washington, D.C.
1944, and the Bureau of Land Management (as mentioned) that all
the 12, 1944, the same "after a complete review of them by the
Commissioner of the Department of the Interior, Washington, D.C.
1944, and the Bureau of Land Management (as mentioned) that all

substantially completed by February 12, 1924. (except certain minor items finally furnished during May, 1924) the master recommended the allowance of a lien for \$12,500 (the balance due and unpaid on the original contract price of \$215,000) and the court in the decree followed this recommendation. One of Altschul's objections to the master's report is that complainant had waived and released its lien for all labor and material furnished up to February 12, 1924, and that there is no evidence showing what labor or materials were furnished after that date. As to the claimer extras the master recommended the allowance of a lien therefor to the extent of \$15,015.22. The court reduced the allowance by \$6,000, but the decree for the total lien of \$21,515.22 included said balance of \$12,500 on the original contract. On the extra work of \$15,015.22, as recommended by the master, the evidence does not fully disclose what was actually furnished prior to February 12, 1924, and what was furnished thereafter. This can only be determined by additional evidence.

Counsel for Altschul have made and argued many points as grounds for a reversal of the decree. One of them is that the decree cannot stand for the reason that a large portion of the amount of the lien awarded includes work and materials furnished to the building prior to February 12, 1924, and that on that date, for a valuable consideration, complainant waived and released its right to a mechanic's lien for all such work and materials as had been furnished up to that time. We think that there is substantial merit in the contention. Counsel for complainant contend that said waiver and release was not intended to apply to any of the extra work but only to that furnished in accordance with the provisions of the original contract. The paper on its face does not indicate any such limited intention. Complainant therein waives and releases "any and all liens, or claim, or right

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of lien on the building and premises "on account of labor or materials, or both, furnished to Feb. 18th, 1944," by it to the building. In 4 Corpus Juris, p. 313, sec. 413-4, it is said: "The principle that a person of full age and acting sui juris can waive a statutory * * provision in his own favor, affecting simply his property or alienable rights * *, applies to mechanic's liens (see Whitcomb v. Eustace, 6 Ill. App. 574; Dymond v. Bruhna, 101 id. 435), and when the lien has once been waived it cannot afterward be revived, in the absence of an express agreement to that effect with the owner. * * What constitutes a waiver is essentially a question of intention." In Turner v. Brenckle, 349 Ill. 394, 404, it is said: "There a general waiver is executed and there is nothing in the context to show a contrary intention, there is nothing left for the court to do but to enforce the contract as the parties have made it." Because of said waiver of lien by complainant as to all work and materials furnished up to February 18, 1944, we are of the opinion that no decree for lien could properly be entered against defendants which included labor and materials furnished by complainant prior to that date, whether the same be considered within the provisions of the contract or as extra work, and that the decree in question should be reversed. And, inasmuch as it is impossible to ascertain from the evidence, as contained in the present record, what labor and materials were actually furnished after said date, the cause must be remanded with directions to the court to cause further evidence to be taken to ascertain what labor and materials complainant actually furnished to the building after such date, either under the contract, or as extras under proper orders of the architect or owner. And, under the evidence, we think that there is some merit in the cross-errors assigned by complainant and that the master's figures as to the extra work and materials furnished by complainant (\$15,015.22) are

were nearly correct than the court's allowance for the same (\$9,017.23). On the taking of the additional evidence, however, there should be no allowance made to complainant for any work or materials furnished to the building prior to February 12, 1924, as we hold that in this proceeding, which is solely for the enforcement of a mechanic's lien under the statute, complainant (because of its own waiver of lien) is only entitled to recover the fair and reasonable value of the work and materials actually furnished the building, either under the contract or as extras under proper orders, after February 12, 1924.

And we do not think that there is any substantial merit in the following other contentions of counsel for Altschul: (1) That the court erred in overruling Altschul's demurrer to the bill as finally amended (Altschul having thereafter answered the bill); (2) that the court erred in not suppressing the entire deposition of Holmes; (3) that certain testimony as contained in that deposition was improperly admitted in evidence; (4) that when in May, 1924, complainant received the last payment of \$5,000, under a certificate then issued, it was then "overpaid;" (5) that, because complainant failed to introduce any evidence as to what were the terms and conditions of the "Landin Award," it is not entitled to recover anything in this proceeding; (6) that, because some of the work was not done to the "entire satisfaction of the architect," complainant is not entitled to recover anything; and (7) that, because no final certificate signed by the architect and the owner was obtained, complainant is not entitled to recover anything. As to the last mentioned contention we think that complainant sufficiently alleged in its amended bill and sufficiently proved facts disclosing a good and sufficient reason or excuse why it did not obtain a final certificate so signed. The evidence disclosed, as found by the master, that complainant by its representatives made repeated endeavors to obtain a final certificate in a proper amount, and that their failure to obtain one, signed by the architect, was because

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of Altschul's positive directions to the architect not to issue one, and that the refusal of Altschul and the architect to issue such a certificate, under all the facts and circumstances in evidence, was unexpected and amounted to a fraud upon complainant's rights. In Hart v. Carley Mfg. Co., 116 Ill. App. 159, 174, it is said: "The law is, without question, that if the architects did not exercise their honest judgment in refusing to give appellee the final certificate, that was bad faith on their part and justified the finding of the jury, and was a sufficient excuse that appellee did not get a final certificate." (See, also, Arnold v. Bourniquis, 124 Ill. 132, 137; Vester v. McKee, 192 Ill. 129, 148.) The judgment in the Hart case, supra, was reversed by our Supreme Court (221 Ill. 444) but solely on the ground that the pleadings in that case did not allege any reasons or excuse for not obtaining a final certificate. In the instant case complainant in its amended bill sufficiently alleged (and the evidence proved) reasons and excuse for not obtaining such a certificate.

For the reasons indicated the decree of the circuit court is reversed and the cause is remanded with directions that the court cause further evidence to be taken to ascertain what labor and materials were actually furnished to the building by complainant after February 12, 1924, either under the provisions of the contract, or as extra work under proper orders of the architect or owner (Altschul), and also to ascertain the reasonable value of such labor and materials, and for such further proceedings and decree for a mechanic's lien as to equity and under the statute shall appertain, not inconsistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Scanlan, J., concur.

33920

JAMES A. HIRSHFIELD,
Appellant,

v.

ARTHUR S. JACKSON et al.,
copartners, doing business
as Jackson Bros., Beesel
& Co.,

Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2571A.831

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in contract to recover back the sum of \$2500, claimed to have been deposited with defendants, there was a trial without a jury in July, 1929, resulting in the court finding the issues in defendants' favor and entering a judgment against plaintiff. This appeal followed.

In plaintiff's amended statement of claim, filed March 6, 1929, he alleged in substance that defendants were copartners engaged in buying and selling stocks and other securities in Chicago as brokers for others; that on November 13, 1928, he deposited with them \$2500, "to be used at his direction and request for certain trades in the purchase of securities according to his order;" that he did not at any time order or direct any trades to be made on his account; that subsequently upon demand defendants refused to return to him said sum, so deposited; and that they are indebted to him in said sum of \$2500, plus legal interest.

In defendants' affidavit of merits they admitted that they were engaged as stock brokers in Chicago and that plaintiff deposited with them \$2500 on November 13, 1928. They alleged in substance that it was agreed at that time that said sum was to be used at the direction of one E. J. Dooley for trades in the purchase or sale of securities for plaintiff's account; that plain-



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authorized and directed defendant to accept and execute all orders from Dooley for such purchases or sales on plaintiff's account; that afterwards they made certain trades in securities as directed by Dooley and that as a result thereof they paid out of said deposit, on behalf of plaintiff, the sum of \$1800 and charged the additional sum of \$79 as brokerage fees; that on November 22, 1928, there was a balance in the account to plaintiff's credit of \$921; that on that date, at his request, they paid him said balance; and that they are not indebted to plaintiff in any sum.

When during the trial it appeared that defendants on November 22, 1928, paid to plaintiff at his request said sum of \$921, plaintiff amended his statement of claim on its face so as to show a claimed indebtedness of defendants of \$1879, plus legal interest from November 13, 1928.

Practically the only ground for reversal of the judgment, as urged by plaintiff's counsel, is that the finding of the court is manifestly against the weight of the evidence on the main issue of fact, whether plaintiff authorized Dooley to make trades in securities, through defendants as brokers, on plaintiff's account. On this issue the evidence was conflicting. Defendants' principal witness, Charles L. Johnston, Jr., a member of the defendant firm, gave testimony strongly supporting the affirmative of the issue. Plaintiff's testimony was to the contrary. Other witnesses testified for defendant. Dooley twice gave testimony, first as a witness for defendants and afterwards as a witness for plaintiff in rebuttal. After reviewing all the testimony and considering all the facts and circumstances in evidence, we are unable to say that the court's finding is manifestly against the weight of the evidence. No useful purpose will be served in detailing or discussing the evidence.

The judgment should be and is affirmed.

APPROVED.

Barnes, P.J., and Scanlan, J., concur.

affirmed and directed defendant to testify and produce all records

from his office for such purposes as may be required by the court.

On November 13, 1933, the court ordered that the records be produced

to the court and that the records be kept in the custody of the court.

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33950

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

JAMES BRENSHAW,

Plaintiff in Error.

WRIT TO MUNICIPAL COURT
OF CHICAGO.

258 L.A. 431

MR. JUSTICE ORINERY DELIVERED THE OPINION OF THE COURT.

After a trial without a jury the court found defendant, James Brenshaw, guilty in manner and form as charged in the information, and on March 18, 1929, after overruling defendant's motions for a new trial and in arrest of judgment, adjudged him guilty of the criminal offense of assault and battery and to pay a fine of \$100. It is sought by this writ of error to reverse the judgment.

The information, signed and sworn to by "Ernest Kunert," alleged in substance that on February 9, 1929, in the City of Chicago, defendant assaulted, struck, beat, wounded and bruised said Ernest Kunert and committed a violent injury upon his person, contrary to the statute, etc. Defendant pleaded not guilty and waived a jury trial.

Defendant's counsel first contend that there is a fatal variance between the information and the proof "in that the name of the alleged victim was not proved as pleaded," because "the information charged that the assault and battery was committed upon the person of Ernest Kunert, whereas the proof showed that the offense was committed upon the person of Frank E. Kunert." The point was not raised at any time in the trial court. The complaining witness, Kunert, testified that he was the "complainant" in the case and that his name was "Frank E. Kunert."



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IN THE
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ATTORNEY GENERAL
WASHINGTON, D.C.
JANUARY 10, 1908

MR. J. H. MURPHY, JR.,
ATTORNEY AT LAW,
NEW YORK, N.Y.

Dear Sir:
I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the proposed amendment to the Constitution of the State of New York, which provides for the election of a single member to represent each county in the Senate. I am sorry to hear that the proposed amendment has not been adopted by the Legislature. It is a very important question, and I am sure that the people of the State will be interested in the result. I am sure that the proposed amendment is for the benefit of the State, and I am sure that it will be adopted in the future. I am sure that the people of the State will be interested in the result. I am sure that the proposed amendment is for the benefit of the State, and I am sure that it will be adopted in the future.

I am, Sir, very respectfully,
Yours very truly,
J. H. MURPHY, JR.
ATTORNEY AT LAW,
NEW YORK, N.Y.

Mrs. Frances Brabent, who was in the company of Kunert in the lobby of the Davis Hotel, Chicago, when the assault was committed upon him by Trenchaw, the hotel detective, referred to him in her testimony as "Ernest" Kunert, and the evidence clearly showed that "Frank E." and "Ernest" Kunert was the same person. We do not think there is any substantial merit in the contention. In People v. Weissman, 296 Ill. 136, 162, it is said: "The modern rule is that a variance as to names alleged in an indictment and proved by the evidence is not to be regarded as material unless it shall be made to appear to the court that the jury were misled by it or that some substantial injury was done to the accused thereby, such as that by reason thereof he was unable to intelligently make his defense or was exposed to the danger of a second trial on the same charge." In the present case it is clear to us that the court, trying the case in place of a jury, could not have been misled on account of the claimed variance, or that the same could have caused, or can possibly cause, a substantial injury to the accused.

Defendant's counsel also contend that Trenchaw was not proven guilty beyond a reasonable doubt. After reviewing the testimony of Kunert and that of his two witnesses corroborating his version of the assault, as well as defendant's testimony and that of the manager and assistant manager of the hotel, called by defendant, we cannot agree with the contention. No useful purpose will be served in setting forth the testimony of the several witnesses.

And, in our opinion, there is no merit in counsel's further contentions that defendant did not receive a fair trial and that the fine imposed was excessive.

Finding no reversible error in the record the judgment of the municipal court is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

[illegible]

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

vs.

MICHAEL MURPHY,
Plaintiff in Error.

WRIT TO MUNICIPAL COURT
OF CHICAGO.

2571A 631

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment rendered against him on September 24, 1929, wherein the municipal court, after finding him guilty in manner and form as charged in the information (a jury having been waived), adjudged him guilty of the criminal offense of "unlawfully and willingly neglecting his employment and having no visible means of support," and sentenced him to the house of correction for the term of six months.

The information, signed and sworn to by Thomas McFarland, was filed on the same day. It alleged that on September 23, 1929, at Chicago, Michael Murphy was "a pilferer;" was "habitually neglectful of his employment and calling and did not lawfully provide for himself;" was "an idle and dissolute person and neglected all lawful business;" and "is known to be a pickpocket, moving no lawful means of support and is habitually found prowling around stores," contrary to the form of the statute, etc.

On the trial defendant was not represented by counsel. The bill of exceptions discloses that McFarland, the complaining witness, testified in substance that he was a police officer of the City of Chicago; that about 2 o'clock on the afternoon of September 23, 1929, he was on the fourth floor of the store of Marshall Field & Co., in Chicago; that he saw Michael Murphy and one Charles Warren as they started to walk down the stairs to the third floor; that he did not know Murphy; that he knew Warren but had not seen him for

REPORT OF THE JURY ON EXHIBITS
 Exhibits in Case No. 100-100000

100-100000

ALABAMA COURT,
 Criminal Division

100-100000

THE JURY WELLS BELIEVE THE CHARGE AS THE FOLLOWS:

By this trial of what defendant would be known as a 100-100000
 most completely against him on September 10, 1935, wherein the evidence
 against, after finding him guilty as charged and then as charged in the
 information (a jury having been waived), which was his guilty as charged
 criminal offense of "knowingly and willfully obtaining the same"
 sent and having no visible means of support," and sentenced him to
 the house of correction for the term of six months.

The information, which was filed in the Criminal Division
 was filed on the same day. It alleged that on September 10, 1935, at
 Chicago, Illinois, defendant was "a thief" and "obtaining the same"
 of his workman and calling him "a thief" and "obtaining the same"
 call;" was "on the side and obtaining the same" and "obtaining the same"
 business;" and "is known to be a thief" and "obtaining the same"
 of support and is habitually found prowling around streets," thereby
 to the fact of the charge, etc.

On the trial defendant was not represented by counsel.
 The bill of exceptions filed was not returned, and defendant
 witness, testified in substance that he was a police officer of the
 City of Chicago; that about 8 o'clock on the afternoon of September
 10, 1935, he was on the tenth floor of the room at 100-100000
 a 100-100000; that he saw defendant sitting and was talking to him
 on the tenth floor of the room at 100-100000; that he
 did not know Murphy; that he knew Thomas but had not seen him for

three years; that Murphy "has a record;" that he searched both men but "found nothing on them except money;" and that without having a warrant he arrested both men, took them to the police station and locked them up. No other witness testified for the State. A so-called "record of Michael Murphy," signed by E. F. Evans, Chief Identification Inspector of the Department of Police, was offered by the State's attorney and admitted in evidence. It purported to show that Murphy, under different names or aliases, had thrice been before judges of the court on charges, resulting in his being fined and, on one occasion in June, 1935, sentenced to the house of correction. What the charges were is not clearly shown.

Murphy was his only witness. He testified that on the afternoon in question he was in Field's store "looking around for shirts;" that Warren was with him; that as they were about to walk downstairs the police officer arrested them and took them to the station and locked them up; and that when arrested he (Murphy) had \$14 in his possession, which money was taken from him.

The above was all the evidence. It clearly is not sufficient to sustain any of the charges in the information. (See People v. Klein, 292 Ill. 420, 426.) And the finding and judgment of the court cannot be justified. Accordingly the judgment is reversed.

REVERSED.

Barnes, P. J., and Scanlan, J., concur.

three years; that Murphy "was a terror;" that he attempted to kill
but "found nothing on him except money;" and that almost nothing
was not he attempted to kill him, took him to the police station and
looked him up. He then witness testimony for the State. A co-
called "witness of Edward Murphy," signed by A. M. Brown, dated
Identification Inspector of the Department of Police, was obtained
by the State's attorney and admitted in evidence. It purported to
show that Murphy, under different names at various times, had been
seen before judges of the courts on charges, resulting in his being
fined and, on one occasion in June, 1928, sentenced to the house
of correction. That the charges were in no way connected with
the case was his only argument. He testified that on the
afternoon in question he was in "Harris's store" "looking around for
clothes;" that Harris was with him; that as they were about to walk
downstairs the police officer arrested them and took them to the
station and locked them up; and that they remained in (thereby) and
left in his possession, which money was taken from him.
The above was all the evidence. It appears in fact
sufficient to establish any of the charges in the indictment. (See
Frank v. State, 232 Ill. 420, 422.) And the finding and judgment
of the court cannot be justified. Accordingly the judgment is
reversed.

REVEREND

Justice, P. L., and Justice, J. L. Brown.

53975

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

CHARLES WARREN,
Plaintiff in Error.

BRON TO MUNICIPAL

COURT OF CHICAGO.

25723-651

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, by this writ, seeks to reverse a judgment of the Municipal court of Chicago rendered against him on September 24, 1929, wherein the court, after finding him guilty in manner and form as charged in the information (a jury having been waived), adjudged him guilty of the criminal offense of "unlawfully and willfully neglecting his employment and having no visible means of support," and sentenced him to the house of correction for the term of six months.

The information, filed on the same day, is practically the same as that filed in the case of People v. Murphy, No. 35,976, in which an opinion has this day been rendered. The evidence, also, is substantially the same, except that the so-called "police record of Charles Warren," not signed or certified by anyone, is longer. For the reasons as stated in the opinion in the Murphy case, the said judgment of the Municipal court against Charles ^{Warren} is reversed.

REVEREND.

Barnes, P. J., and Scanlan, J., concur.

1998

100-443887-100

43

1994-1995

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a propaganda organization.

The information, which was obtained from the Bureau of Investigation, shows that there is no record of any person named "John Doe" who has been convicted of a crime involving the sale of narcotics.

Very truly yours,
Walter
Director

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33987

ANDREW L. GROTE et al.,
Complainants,

v.

CATHERINE LEWIS et al.,
Defendants.

On appeal of WARD T. HUSTON,
petitioner,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

257 I.A. 632

MR. JUSTICE GARREY DELIVERED THE OPINION OF THE COURT.

In a partition proceeding, in which a decree of sale of the premises had been entered on June 12, 1929, and in which the master's report of sale had been approved by order entered on July 30, 1929, Ward F. Huston filed his verified petition on August 23, 1929, praying that the master "who has the proceeds of the sale in his possession, pay to petitioner 2 per cent of the purchase price, which was \$30,000, or the sum of \$600, from the proceeds of the sale." On September 26, 1929, after a hearing in open court before the chancellor, the petition was dismissed for want of equity, and the present appeal followed.

In the decree of sale the court found that the commissioners had appraised the value of the premises at \$45,000, and the court directed that the master "bring the money realized from the sale into court to be distributed to the parties entitled thereto under the direction of the court," and further ordered that "a real estate broker's commission of two per cent (2%) of the selling price be paid by the master to the party procuring a purchaser of the premises out of the proceeds of the sale, provided such purchaser fully consummates his purchase."

1999

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the following day, 1971, and is dated 1971.

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all things as well as his father and his mother, 7, 10, 12, 13

"I will do it," said the man.

...the

10. The following are the names of the persons who have been appointed to the various committees of the Board of Directors:

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10-10-68

Library of Theology, Theology, Theology

Journal of Management Education 30(6)p.789-804

James and his family are extremely kind and helpful people and we enjoyed our stay very much.

1. The following information is for your information only and is not to be used for any other purpose.

There is no significant difference in the number of

[illegible]

... et dans quelle mesure les personnes âgées ont-elles accès à la justice ?

It is the author's hope that this book will be a valuable addition to the literature of the field.

... ..

* <http://www.elsevier.com/locate/locate/jbiotec>

In the report of sale, the master reported that the sale was had on July 12, 1929; that "G. Wallace Hood" bid for the premises \$30,000, - payable \$15,000 in cash at the time of the delivery of the master's deed, and \$15,000 in notes secured by a trust deed on the premises, etc.; that the bid was the highest one offered and that, accordingly, the premises were sold to said Hood, who has deposited \$1,500 on account of the purchase price and stands ready and willing to pay the balance, etc.; and that a notice was served upon the master by Thomas J. Ely, of Chicago, to the effect that he (Ely) "induced the purchaser, G. Wallace Hood, to interest himself in the premises, and that he (Ely) is, therefore, entitled to the broker's commission of two (2) per cent of the selling price in accordance with the provisions of the decree."

In the order approving the master's report of sale, entered July 20, 1929, it is ordered:

"That immediately after the payment of aforesaid payment of \$15,000, and the execution and delivery of said notes and trust deed, the master shall pay to one Thomas J. Ely, the party who procured said purchaser at said sale, the sum of \$600 as and for the commission of two (2) per cent of said selling price," etc.

In Huston's said petition, it is alleged that he is a duly licensed real estate broker in Chicago; that, pursuant to the terms of the decree and the advertisement of the master relative to the payment of a broker's commission, etc., he "procured a purchaser for the real estate, to-wit, one G. Wallace Hood, and bid the same in for him at the sale;" and that said sale has been consummated.

On the hearing on the petition, Huston testified in his own behalf and called as witnesses for him the master in chancery, Archie M. Cohen, and Thomas J. Ely, and all were cross-examined. Certain letters and writings also were introduced. At the close of petitioner's evidence the court said it did not desire to hear further evidence and, after Huston had moved the court "to amend and correct the order of July 20, 1929," by striking out the finding of the court therein to

the effect that Ely was the party who had procured the purchaser at the sale, entered the order appealed from, dismissing Huston's petition for want of equity, as first above mentioned.

Petitioner's evidence disclosed in substance the followings:

The master duly advertised that the sale would take place on July 12, 1929. In the advertisement was the statement that a broker's commission of two (2%) per cent would be paid to the party procuring a purchaser. On July 2nd, Ely wrote Huston calling his attention to the proposed sale, enclosing a copy of the master's advertisement, and making certain statements showing the desirability of the property, etc. Ely also personally talked to Huston about the property and the proposed sale on several occasions. On July 3rd Ely wrote to the solicitor of the complainants in the partition suit, stating that he had solicited Huston, "and his associate, G. Wallace Reed," to purchase the property at the sale, and that Huston had promised him (Ely) that he would be present at the sale and make a bid, etc. The letter contained the notification that if either Huston or Reed should purchase the property he (Ely) would be entitled to the 2% commission so advertised. After Ely had talked with Huston about the property, the latter viewed it and concluded that it would be "a good buy for somebody at \$30,000." Huston then interested the vice president of a railroad company in the property with the result that the railroad company agreed to buy it, if it could be obtained at the sale for \$30,000, and instructed Huston to buy it for the railroad company for that sum, if he could. At the sale, after Huston had bid in the property for \$30,000, and had made a deposit of \$1,500, he requested that the master cause title to be conveyed to Reed, who was an employe of Huston. On August 8th, out of monies furnished by the railroad company, Huston delivered his two checks to the master for \$13,800. The railroad company was the real purchaser of the property and Huston was its agent in making the purchase. About a week after the sale

The attached copy of the letter was sent to the Hon. Mr. Justice
 and will be sent to the Hon. Mr. Justice.

For copy of letter, see above page 45.

Respectfully,
 The Hon. Mr. Justice.

The Hon. Mr. Justice.

The Hon. Mr. Justice.

The Hon. Mr. Justice.

The Hon. Mr. Justice.

The Hon. Mr. Justice.

The Hon. Mr. Justice.

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The Hon. Mr. Justice.

The Hon. Mr. Justice.

Huston told the master that he claimed the commission of 2% because of procuring Reed as the purchaser. The master replied that this was a matter for the court to decide. Huston made no further efforts to obtain a commission until he filed his petition on August 28th, wherein is contained his verified statement that Reed was the purchaser. He did not file any objections to the master's report of sale of July 20th, or within apt time to the court's order of the same date approving said report, wherein is contained the direction that the master pay to Ely, "the party who procured said purchaser at said sale," the 2% commission. His petition of August 28th was not filed until during the second term of court after said approval order was entered. Not until the hearing on Huston's petition in September, 1929, did it appear (and then from his own testimony) that at the partition sale he acted as the agent of the railroad company in procuring for it the property at \$30,000.

In view of the evidence, and under the law, we think that the court was fully justified in dismissing Huston's petition for want of equity. While acting as the agent of the railroad company to bring about the purchase of the property for it at the partition sale at the price of \$30,000 (two-thirds of its appraised value as reported by the commissioners), he could not at the same time properly act as the agent of the sellers, or legally be entitled to any commission to be paid out of their funds. (Law v. Ware, 238 Ill. 360, 369; Hunn v. Keach, 114 id. 259, 264-5; Young v. Trainor, 158 id. 486, 430-1.) Furthermore, after Huston had purchased the property at the sale and had requested the master to cause title to be conveyed to his employe (Reed), he, through or by Reed, could have objected to the court's order of approval of the master's sale, particularly to the finding therein contained as to Ely being the party who had procured the purchaser and being entitled to said 2% commission. (Speck v. Pullman Car Co., 121 Ill. 33, 37; Lavien v. Gibbs, 174 id. 272, 273; Chandler v. Percy, 195 id. 396, 605.) Not having made such objections in apt time the matter as to

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of procuring ... as the government. The master replied that this ...
was a matter for the court to decide. The master said he wished to ...
to obtain a commission would be filed his petition in court ...
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... master ...

who was entitled to said 2% commission, as well as the fact that the property had been sold by virtue of the decree of sale of June 19, 1929, became adjudicated. and after the passing of the term the matter could not be re-opened as attempted by Huston's said petition. (Yonatti Brewing Co. v. Kohler, 240 Ill. 169, 372; Mosher v. Valentynovicz, 255 id. 113, 120.)

The order of the circuit court of September 26, 1929, appealed from, is affirmed.

ATTORNEYS.

Barnes, P. J., and Scanlan, J., concur.

THESE, however, are not the only factors which have influenced the development of the American people. The American people have also been influenced by the American environment, the American climate, the American soil, the American water, the American air, the American sun, the American moon, the American stars, the American planets, the American galaxies, the American universe, the American everything.

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1. 100, 110, 120, 130, 140, 150, 160, 170, 180, 190, 200, 210, 220, 230, 240, 250, 260, 270, 280, 290, 300, 310, 320, 330, 340, 350, 360, 370, 380, 390, 400, 410, 420, 430, 440, 450, 460, 470, 480, 490, 500, 510, 520, 530, 540, 550, 560, 570, 580, 590, 600, 610, 620, 630, 640, 650, 660, 670, 680, 690, 700, 710, 720, 730, 740, 750, 760, 770, 780, 790, 800, 810, 820, 830, 840, 850, 860, 870, 880, 890, 900, 910, 920, 930, 940, 950, 960, 970, 980, 990, 1000, 1010, 1020, 1030, 1040, 1050, 1060, 1070, 1080, 1090, 1100, 1110, 1120, 1130, 1140, 1150, 1160, 1170, 1180, 1190, 1200, 1210, 1220, 1230, 1240, 1250, 1260, 1270, 1280, 1290, 1300, 1310, 1320, 1330, 1340, 1350, 1360, 1370, 1380, 1390, 1400, 1410, 1420, 1430, 1440, 1450, 1460, 1470, 1480, 1490, 1500, 1510, 1520, 1530, 1540, 1550, 1560, 1570, 1580, 1590, 1600, 1610, 1620, 1630, 1640, 1650, 1660, 1670, 1680, 1690, 1700, 1710, 1720, 1730, 1740, 1750, 1760, 1770, 1780, 1790, 1800, 1810, 1820, 1830, 1840, 1850, 1860, 1870, 1880, 1890, 1900, 1910, 1920, 1930, 1940, 1950, 1960, 1970, 1980, 1990, 2000, 2010, 2020, 2030, 2040, 2050, 2060, 2070, 2080, 2090, 2100, 2110, 2120, 2130, 2140, 2150, 2160, 2170, 2180, 2190, 2200, 2210, 2220, 2230, 2240, 2250, 2260, 2270, 2280, 2290, 2300, 2310, 2320, 2330, 2340, 2350, 2360, 2370, 2380, 2390, 2400, 2410, 2420, 2430, 2440, 2450, 2460, 2470, 2480, 2490, 2500, 2510, 2520, 2530, 2540, 2550, 2560, 2570, 2580, 2590, 2600, 2610, 2620, 2630, 2640, 2650, 2660, 2670, 2680, 2690, 2700, 2710, 2720, 2730, 2740, 2750, 2760, 2770, 2780, 2790, 2800, 2810, 2820, 2830, 2840, 2850, 2860, 2870, 2880, 2890, 2900, 2910, 2920, 2930, 2940, 2950, 2960, 2970, 2980, 2990, 3000, 3010, 3020, 3030, 3040, 3050, 3060, 3070, 3080, 3090, 3100, 3110, 3120, 3130, 3140, 3150, 3160, 3170, 3180, 3190, 3200, 3210, 3220, 3230, 3240, 3250, 3260, 3270, 3280, 3290, 3300, 3310, 3320, 3330, 3340, 3350, 3360, 3370, 3380, 3390, 3400, 3410, 3420, 3430, 3440, 3450, 3460, 3470, 3480, 3490, 3500, 3510, 3520, 3530, 3540, 3550, 3560, 3570, 3580, 3590, 3600, 3610, 3620, 3630, 3640, 3650, 3660, 3670, 3680, 3690, 3700, 3710, 3720, 3730, 3740, 3750, 3760, 3770, 3780, 3790, 3800, 3810, 3820, 3830, 3840, 3850, 3860, 3870, 3880, 3890, 3900, 3910, 3920, 3930, 3940, 3950, 3960, 3970, 3980, 3990, 4000, 4010, 4020, 4030, 4040, 4050, 4060, 4070, 4080, 4090, 4100, 4110, 4120, 4130, 4140, 4150, 4160, 4170, 4180, 4190, 4200, 4210, 4220, 4230, 4240, 4250, 4260, 4270, 4280, 4290, 4300, 4310, 4320, 4330, 4340, 4350, 4360, 4370, 4380, 4390, 4400, 4410, 4420, 4430, 4440, 4450, 4460, 4470, 4480, 4490, 4500, 4510, 4520, 4530, 4540, 4550, 4560, 4570, 4580, 4590, 4600, 4610, 4620, 4630, 4640, 4650, 4660, 4670, 4680, 4690, 4700, 4710, 4720, 4730, 4740, 4750, 4760, 4770, 4780, 4790, 4800, 4810, 4820, 4830, 4840, 4850, 4860, 4870, 4880, 4890, 4900, 4910, 4920, 4930, 4940, 4950, 4960, 4970, 4980, 4990, 5000, 5010, 5020, 5030, 5040, 5050, 5060, 5070, 5080, 5090, 5100, 5110, 5120, 5130, 5140, 5150, 5160, 5170, 5180, 5190, 5200, 5210, 5220, 5230, 5240, 5250, 5260, 5270, 5280, 5290, 5300, 5310, 5320, 5330, 5340, 5350, 5360, 5370, 5380, 5390, 5400, 5410, 5420, 5430, 5440, 5450, 5460, 5470, 5480, 5490, 5500, 5510, 5520, 5530, 5540, 5550, 5560, 5570, 5580, 5590, 5600, 5610, 5620, 5630, 5640, 5650, 5660, 5670, 5680, 5690, 5700, 5710, 5720, 5730, 5740, 5750, 5760, 5770, 5780, 5790, 5800, 5810, 5820, 5830, 5840, 5850, 5860, 5870, 5880, 5890, 5900, 5910, 5920, 5930, 5940, 5950, 5960, 5970, 5980, 5990, 6000, 6010, 6020, 6030, 6040, 6050, 6060, 6070, 6080, 6090, 6100, 6110, 6120, 6130, 6140, 6150, 6160, 6170, 6180, 6190, 6200, 6210, 6220, 6230, 6240, 6250, 6260, 6270, 6280, 6290, 6300, 6310, 6320, 6330, 6340, 6350, 6360, 6370, 6380, 6390, 6400, 6410, 6420, 6430, 6440, 6450, 6460, 6470, 6480, 6490, 6500, 6510, 6520, 6530, 6540, 6550, 6560, 6570, 6580, 6590, 6600, 6610, 6620, 6630, 6640, 6650, 6660, 6670, 6680, 6690, 6700, 6710, 6720, 6730, 6740, 6750, 6760, 6770, 6780, 6790, 6800, 6810, 6820, 6830, 6840, 6850, 6860, 6870, 6880, 6890, 6900, 6910, 6920, 6930, 6940, 6950, 6960, 6970, 6980, 6990, 7000, 7010, 7020, 7030, 7040, 7050, 7060,

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34017

CITY OF CHICAGO,
Appellee,

v.

ELLA FOGEL,
Appellant.

30 7
LAWELL JOHN MUNICIPAL
COURT OF CHICAGO.

259 2A 632²

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

On September 7, 1929, Harry Miller, a police officer of the City of Chicago, filed a complaint in the municipal court, alleging that defendant, Ella Fogel, at Chicago on September 6, 1929, "did make, aid, countenance and assist in making an improper noise, disturbance, breach of the peace and diversion tending to a breach of the peace, to-wit, disturbing the peace, in violation of section 2655 of the Chicago Municipal Code of 1922," etc. On the same day Miller filed another complaint against her, alleging violations of the provisions of section 3703 of said Municipal Code (engaging in a procession in a public street or holding an open air meeting without a permit.)

On the same day (September 7th), George Lowe, a police officer, filed two similar complaints against Sam Reed, one charging him with a violation on September 6, 1929, of said section 3703, and the other charging him with a violation on that day of said section 2655.

All four cases came on for trial on September 17, 1929. The defendants were present and represented by the same attorneys. It was stipulated that the four cases should be tried together before the same jury and that separate verdicts should be returned. Miller and Lowe were called as witnesses for the City, and each of the defend-

YOUNG

100-443887-100

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SECRET

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

to be a 100% reliable source, and it is not.

the City of Chicago, which is concluded in the municipal corporation.

allegedly that he had been in the area of the ...

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... ..

1. Institute of Energy and Materials, Ltd., Energy and Materials

Section 230 of the Chicago Municipal Code is hereby amended to read as follows:

at [redacted] was [redacted] before [redacted] to [redacted] and [redacted]

10-10-68

1987

On the same day (September 11, 1964) the same was done.

11-11-61

under the name, "L. J. Smith & Co. Inc.", and a redemptor no indicated

... ..

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

the defendant was present and represented by the same attorney.

Received 10 April 2003; accepted 10 April 2003

1. The first part of the report is a general statement of the purpose of the study and the objectives of the research.

and have been called as witnesses for the defense.

ants testified. The jury returned four verdicts. The first found the defendant, Della Vogel, "guilty of a violation of the ordinance described in the complaint as section 2685" and assessed a fine against her in the sum of \$75. The second verdict found her "not guilty on section 3703." The third verdict found the defendant, Sam Reed "guilty of a violation of the ordinance described in the complaint as section 3703," and assessed a fine against him in the sum of \$75. The fourth verdict found him "not guilty on section 2685." On the verdict of guilty against Della Vogel the court entered judgment against her, adjudging that plaintiff recover from her a fine of \$75, as assessed, and costs of suit. From this judgment she prosecutes the present appeal.

The following facts in substance are disclosed from the evidence: About 7 o'clock on the evening of September 6, 1926, there was "some kind of a socialist meeting" being conducted, outdoors, at the intersection of 47th st east and Gross and Ashland avenues, Chicago. The police department, having been notified that there was a "disturbance" there, sent policemen to the place. When they arrived they found a meeting in progress and more than 300 people congregated on the street and on the sidewalk, both of which in consequence were "blocked up." There were banners and signs, bearing the slogans: "Defend the Soviet Union;" "Organize the Young Unorganized Workers;" "Down with the Cossacks" (accompanied with the picture of a policeman); "Working Women of the World Unite;" "Fight for the Abolition of Piecework;" and other banners, bearing other slogans. The defendant Reed was speaking as to "the brutality of the police" and saying "down with capitalism." Reed was directed to cease speaking, which he did but shortly thereafter commenced again. Neither he nor any one had obtained a permit from the city to conduct the meeting. After this fact was called to his attention he again started to address the meeting and was arrested. The police then dispersed the crowd, telling them to move on.

Some of the crowd, including Della Vogel, then started a parade on 47th street, displaying the banners. While the policemen were attempting to break up the parade she, according to Miller's testimony, "started poking us with sticks and put up a fight, kicking and fighting." She was then arrested. He testified that the policemen "didn't let anybody speak;" that they pulled Reed off and nobody spoke afterwards; and that while she was in the parade, carrying a banner, two of the officers grabbed her and she "poked them with sticks" because her "skirt was unbuttoned," and the officers wouldn't let her down to button it. Reed testified that he "tried to speak three times;" that the banners were handled by people in the audience; that when the officer pulled him down he tried to speak again; that when he was arrested "everything was peaceful;" that the "organization" arranged for the meeting; that he did not know whether or not a permit for the meeting had been applied for; that the "workers in the crowd lifted him on their shoulders so that he could speak;" and that he was not in the parade which followed.

The main contention of counsel for Della Vogel is that the judgment against her should be reversed because the evidence does not show that she was guilty of disorderly conduct in violation of the provisions of section 2655 of the Municipal Code. In view of the evidence as above outlined, we do not think there is any merit in the contention. Equally without merit is counsel's further contention that the court abused its discretion in consolidating all four of the cases for trial before the same jury. It appears both from the common law record and from the bill of exceptions that prior to the empanelling of the jury the consolidation was agreed to by all parties concerned.

The judgment appealed from against Della Vogel is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

[illegible][illegible]

34018

CITY OF CHICAGO,
Appellee,

v.

SAM REED,
Appellant.

3 1 7
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

258 LA. 582³

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On September 7, 1929, George Lowe, a police officer of the City of Chicago, filed a complaint in the Municipal court alleging that defendant, Sam Reed, at Chicago on September 6, 1929, was "unlawfully engaged in a parade or procession in or upon 47th street and Gross avenue, a street or public way in said city, and did hold an open air public meeting on ground abutting upon a street in said city, and did then and there fail and neglect to obtain a permit in writing therefor from the police department of said City, in violation of section 3703 of the Chicago Municipal Code of 1922." On the same day Lowe filed another complaint against Reed, charging him with disorderly conduct in violation of the provisions of section 2656 of said Municipal Code. On the same day Harry Miller, a police officer, filed two similar complaints against Della Vogel, charging her with violations on September 6th of the provisions of said sections, respectively, of said Municipal Code. All four cases came on for trial on September 17th. The two defendants were present and represented by the same attorneys, and it was stipulated in open court that the four cases should be tried together before the same jury, - a separate verdicts, however, to be rendered. At the conclusion of the hearing, at which testimony was introduced on behalf of the City and both defendants testified,

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There is no other person named [redacted] in the [redacted] area.

1. *Journal of the American Medical Association*, 1964; 191: 1000-1001.

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 08-14-2008 BY 60322 UCBAW

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1. The first of these is the fact that the

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1993; 1994; 1995; 1996; 1997; 1998; 1999; 2000; 2001; 2002; 2003; 2004; 2005; 2006; 2007; 2008; 2009; 2010; 2011; 2012; 2013; 2014; 2015; 2016; 2017; 2018; 2019; 2020; 2021; 2022; 2023; 2024; 2025; 2026; 2027; 2028; 2029; 2030; 2031; 2032; 2033; 2034; 2035; 2036; 2037; 2038; 2039; 2040; 2041; 2042; 2043; 2044; 2045; 2046; 2047; 2048; 2049; 2050; 2051; 2052; 2053; 2054; 2055; 2056; 2057; 2058; 2059; 2060; 2061; 2062; 2063; 2064; 2065; 2066; 2067; 2068; 2069; 2070; 2071; 2072; 2073; 2074; 2075; 2076; 2077; 2078; 2079; 2080; 2081; 2082; 2083; 2084; 2085; 2086; 2087; 2088; 2089; 2090; 2091; 2092; 2093; 2094; 2095; 2096; 2097; 2098; 2099; 2100; 2101; 2102; 2103; 2104; 2105; 2106; 2107; 2108; 2109; 2110; 2111; 2112; 2113; 2114; 2115; 2116; 2117; 2118; 2119; 2120; 2121; 2122; 2123; 2124; 2125; 2126; 2127; 2128; 2129; 2130; 2131; 2132; 2133; 2134; 2135; 2136; 2137; 2138; 2139; 2140; 2141; 2142; 2143; 2144; 2145; 2146; 2147; 2148; 2149; 2150; 2151; 2152; 2153; 2154; 2155; 2156; 2157; 2158; 2159; 2160; 2161; 2162; 2163; 2164; 2165; 2166; 2167; 2168; 2169; 2170; 2171; 2172; 2173; 2174; 2175; 2176; 2177; 2178; 2179; 2180; 2181; 2182; 2183; 2184; 2185; 2186; 2187; 2188; 2189; 2190; 2191; 2192; 2193; 2194; 2195; 2196; 2197; 2198; 2199; 2200; 2201; 2202; 2203; 2204; 2205; 2206; 2207; 2208; 2209; 2210; 2211; 2212; 2213; 2214; 2215; 2216; 2217; 2218; 2219; 2220; 2221; 2222; 2223; 2224; 2225; 2226; 2227; 2228; 2229; 2230; 2231; 2232; 2233; 2234; 2235; 2236; 2237; 2238; 2239; 2240; 2241; 2242; 2243; 2244; 2245; 2246; 2247; 2248; 2249; 2250; 2251; 2252; 2253; 2254; 2255; 2256; 2257; 2258; 2259; 2260; 2261; 2262; 2263; 2264; 2265; 2266; 2267; 2268; 2269; 2270; 2271; 2272; 2273; 2274; 2275; 2276; 2277; 2278; 2279; 2280; 2281; 2282; 2283; 2284; 2285; 2286; 2287; 2288; 2289; 2290; 2291; 2292; 2293; 2294; 2295; 2296; 2297; 2298; 2299; 2300; 2301; 2302; 2303; 2304; 2305; 2306; 2307; 2308; 2309; 2310; 2311; 2312; 2313; 2314; 2315; 2316; 2317; 2318; 2319; 2320; 2321; 2322; 2323; 2324; 2325; 2326; 2327; 2328; 2329; 2330; 2331; 2332; 2333; 2334; 2335; 2336; 2337; 2338; 2339; 2340; 2341; 2342; 2343; 2344; 2345; 2346; 2347; 2348; 2349; 2350; 2351; 2352; 2353; 2354; 2355; 2356; 2357; 2358; 2359; 2360; 2361; 2362; 2363; 2364; 2365; 2366; 2367; 2368; 2369; 2370; 2371; 2372; 2373; 2374; 2375; 2376; 2377; 2378; 2379; 2380; 2381; 2382; 2383; 2384; 2385; 2386; 2387; 2388; 2389; 2390; 2391; 2392; 2393; 2394; 2395; 2396; 2397; 2398; 2399; 2400; 2401; 2402; 2403; 2404; 2405; 2406; 2407; 2408; 2409; 2410; 2411; 2412; 2413; 2414; 2415; 2416; 2417; 2418; 2419; 2420; 2421; 2422; 2423; 2424; 2425; 2426; 2427; 2428; 2429; 2430; 2431; 2432; 2433; 2434; 2435; 2436; 2437; 2438; 2439; 2440; 2441; 2442; 2443; 2444; 2445; 2446; 2447; 2448; 2449; 2450; 2451; 2452; 2453; 2454; 2455; 2456; 2457; 2458; 2459; 2460; 2461; 2462; 2463; 2464; 2465; 2466; 2467; 2468; 2469; 2470; 2471; 2472; 2473; 2474; 2475; 2476; 2477; 2478; 2479; 2480; 2481; 2482; 2483; 2484; 2485; 2486; 2487; 2488; 2489; 2490; 2491; 2492; 2493; 2494; 2495; 2496; 2497; 2498; 2499; 2500; 2501; 2502; 2503; 2504; 2505; 2506; 2507; 2508; 2509; 2510; 2511; 2512; 2513; 2514; 2515; 2516; 2517; 2518; 2519; 2520; 2521; 2522; 2523; 2524; 2525; 2526; 2527; 2528; 2529; 2530; 2531; 2532; 2533; 2534; 2535; 2536; 2537; 2538; 2539; 2540; 2541; 2542; 2543; 2544; 2545; 2546; 2547; 2548; 2549; 2550; 2551; 2552; 2553; 2554; 2555; 2556; 2557; 2558; 2559; 2560; 2561; 2562; 2563; 2564; 2565; 2566; 2567; 2568; 2569; 2570; 2571; 2572; 2573; 2574; 2575; 2576; 2577; 2578; 2579; 2580; 2581; 2582; 2583; 2584; 2585; 2586; 2587; 2588; 2589; 2590; 2591; 2592; 2593; 2594; 2595; 2596; 2597; 2598; 2599; 2600; 2601; 2602; 2603; 2604; 2605; 2606; 2607; 2608; 2609; 2610; 2611; 2612; 2613; 2614; 2615; 2616; 2617; 2618; 2619; 2620; 2621; 2622; 2623; 2624; 2625; 2626; 2627; 2628; 2629; 2630; 2631; 2632; 2633; 2634; 2635; 2636; 2637; 2638; 2639; 2640; 2641; 2642; 2643; 2644; 2645; 2646; 2647; 2648; 2649; 2650; 2651; 2652; 2653; 2654; 2655; 2656; 2657; 2658; 2659; 2660; 2661; 2662; 2663; 2664; 2665; 2666; 2667; 2668; 2669; 2670; 2671; 2672; 2673; 2674; 26

1. The first part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as $t \rightarrow \infty$. It is shown that the solutions of the system (1) tend to zero as $t \rightarrow \infty$ if and only if the matrix A is stable. The second part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as $t \rightarrow \infty$ if the matrix A is not stable. It is shown that the solutions of the system (1) tend to infinity as $t \rightarrow \infty$ if and only if the matrix A is not stable.

10. Article 10 of the 1948 Constitution states that "the State shall protect the rights of the people to work, to form unions, to bargain collectively, and to strike."

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1. The first of these is the fact that the system is not a simple one, but a complex one, involving many different factors and many different people. The second is that the system is not a static one, but a dynamic one, which is constantly changing and evolving. The third is that the system is not a closed one, but an open one, which is constantly interacting with the outside world. The fourth is that the system is not a linear one, but a non-linear one, which is characterized by feedback loops and other non-linear relationships. The fifth is that the system is not a deterministic one, but a probabilistic one, which is characterized by uncertainty and risk. The sixth is that the system is not a single one, but a multiple one, which is characterized by many different perspectives and many different interests. The seventh is that the system is not a simple one, but a complex one, which is characterized by many different factors and many different people. The eighth is that the system is not a static one, but a dynamic one, which is constantly changing and evolving. The ninth is that the system is not a closed one, but an open one, which is constantly interacting with the outside world. The tenth is that the system is not a linear one, but a non-linear one, which is characterized by feedback loops and other non-linear relationships. The eleventh is that the system is not a deterministic one, but a probabilistic one, which is characterized by uncertainty and risk. The twelfth is that the system is not a single one, but a multiple one, which is characterized by many different perspectives and many different interests.

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1. The first of these is the fact that the

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

2. The following information is required for the purpose of the study:

Specialized fields of application are in industries where the structures are

Information is subject to change without notice.

the jury returned four verdicts. In the instant case the jury found Reed "guilty of a violation of the ordinance described in the complaint as section 3703," and assessed a fine of \$75 against him. He, however, was found not guilty on the other complaint against him, for claimed violation of section 2655. Della Vogel was found guilty of a violation of said section 2655, but not guilty on said section 3703. Both defendants perfected separate appeals to this appellate court from the respective judgments of \$75 rendered against them upon said verdicts of guilty.

We have this day filed an opinion in the case against Della Vogel, case No. 34917, affirming said judgment against her. In that opinion we outlined the facts as disclosed from the evidence introduced upon the trial, to which outline we refer without here repeating the same.

In said section 3703 of the Municipal Code it is provided:

"No parade or procession shall be allowed upon any street or public way in the city, nor shall any open-air public meeting be held upon any ground abutting upon any street or public way in the city, until a permit in writing therefor shall first be obtained from the police department. Application to conduct such parade or procession or open-air meeting shall be made in writing to the superintendent of police by the person or persons in charge or control thereof, or responsible therefor, * * and, in case of an open-air meeting, such application shall specify the place at which it is desired to hold such meeting, the purpose thereof, and the name of the person, corporation or society in control thereof or responsible therefor, the time at which such public meeting is to be held, and the probable duration thereof. * * "

Although the city has power to regulate the use of streets (Canill's Stat. 1929, chap. 24, par. 65 (9), p. 328), counsel for Reed first contend that the evidence shows that the meeting was not held on ground "abutting" on the street, but was held on the street, and that, hence, the judgment cannot stand. There is no substantial merit in the contention. The evidence sufficiently shows that at least a portion of the meeting was held on ground abutting on a public street. Furthermore the parade, which followed the speaking, was on a public

street. It is conceded that no permit was applied for or obtained, either for the meeting or the parade, and it sufficiently appears that Reed had control or partial control of the meeting. And in view of the evidence, we do not think the court committed error in refusing to give Reed's offered instruction, No. 1, which was to the effect that "there is no ordinance requiring anyone to obtain a permit for the purpose of conducting a meeting on a public street in the city," etc.

Counsel further contend that the court abused its discretion in consolidating the four cases - the two against Reed and the two against Della Fogel - and having the evidence heard before the same jury. A sufficient answer to the contention is that this method of procedure was agreed to in open court by all parties concerned before the jury was empanelled.

Finding no reversible error in the record, the judgment against Reed for \$75, appealed from, is affirmed.

AFFIRMED.

Barnes, F. J., and Scamman, J., concur.

33622

327
FRANCIS W. PETERSON,
Appellant,

v.

HAROLD W. SGOVEL,
administrator with the
will annexed of the estate
of J. W. BELL, deceased,
Appellee.

APPEAL FROM COUNTY COURT,
COOK COUNTY.

257-11-1324

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Francis W. Peterson, an attorney at law, sued J. W. Bell and Frank Evans for fees alleged to be due him. While the suit was pending Bell died and the administrator of his estate was substituted. The suit was then dismissed as to Evans. The case was tried before the court, with a jury, and at the conclusion of plaintiff's evidence the court directed the jury to return a verdict in favor of defendant. Judgment was entered on the verdict and plaintiff has appealed.

Defendant contends that the present appeal should be dismissed for the reason that there was no order entered approving the appeal bond. It appears that the trial court approved the bond upon its face but did not enter an order approving the same. In First Nat'l Bank v. Village of Dolton, 254 Ill. App. 501, we held that an appeal will not be dismissed because no order of the court approving the bond or authorizing the clerk to approve it appears in the record, where the approval of the trial judge appears on the filed bond. We adhere to that ruling.

Plaintiff undertook to prove his case solely by the witness Davidson. Davidson, an attorney at law, was a partner of plaintiff until May 1, 1923. At that time the partnership was dissolved and thereafter each conducted his own business and the

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witness had no interest of any kind or nature in the business of plaintiff. Defendant objected to the witness testifying to anything concerning the claim of plaintiff on the ground that the witness was disqualified under Sec. 2, Chap. 51, Cahill's Statutes. The court sustained this objection and plaintiff contends that the court's action in this regard was error. The contention is a meritorious one. Section 2 reads as follows:

"Par. 2. Witnesses - Parties and interested witnesses not competent against trustees, representatives, heirs, legatees and devisees.) Sec. 2. No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely:"

In Holland v. Peoples Bank, 303 Ill. 381, 391, the court said:

"The interest which will disqualify a witness under the Evidence act must be a legal interest in the result of the suit and must be certain, direct and immediate. (Johnson v. Pottery, 239 Ill. 578; Bellman v. Epstein, 279 id. 34.)"

In Flynn v. Flynn, 283 Ill. 806, 817, the court said:

"This court has held that the interest which will disqualify a witness must be certain, direct and immediate, showing that he will gain or lose as the direct result of the suit; that if the testimony does not show such direct, certain and immediate interest, his interest, if any, goes merely to his credibility and not to his incompetency. (Detlaft v. Firebaugh, 251 Ill. 190; Bailey v. Beall, 251 id. 577.)"

In Southern Collegiate Institute v. Avery, 157 Ill. App. 568, 570, the court said:

"The true test of the interest of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action."

There is nothing in the testimony of Davidson to show that he had any legal interest in the outcome of the suit. On the contrary, his testimony affirmatively shows that he had no such interest. The mere fact that he was a partner of plaintiff at the time of

the beginning of the transactions out of which the claim of plaintiff grew, did not disqualify him.

Defendant contends that plaintiff's offer of proof failed to make out a prima facie case and therefore the judgment should not be reversed. There is no merit in this contention. This case should be tried on the merits.

The judgment of the County court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

The members of the Commission are all men of high re-

spectability, and are especially men.

The Commission consists of the following members:

There is also a Technical Commission, which is composed of the following

members: There is no need to say anything more about this Commission.

This Commission is also composed of the following members:

The interest of the Commission is to study the

problem and the Commission is especially

interested in the following

members: The Commission is especially

33883

CHARLES A. SAMAR,
Appellee,

v.

THE ROSELAND STATE SAVINGS
BANK, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 I.A. 633

MR. JUSTICE SCAMLAN DELIVERED THE OPINION OF THE COURT.

Charles A. Samar, plaintiff, brought an action of replevin against The Roseland State Savings Bank, a corporation, defendant, for the possession of a certain note made by Louis E. Lambson and William Matsaranges, dated January 13, 1927, in the amount of \$4,500, and six interest coupon notes for the sum of \$135 each. The note and interest coupons were secured by a trust deed, bearing the same date, made by Louis E. Lambson and William Matsaranges, conveying certain property therein described to defendant as trustee. When the replevin writ was served on defendant the note and interest coupons were not in its possession and thereafter plaintiff filed a count in trover in the amount of \$4,935. The case was tried before the court, without a jury, and there was a finding in favor of plaintiff. Defendant has appealed from the judgment entered upon the finding.

The testimony shows that the note and interest coupons, together with the trust deed, were pledged with defendant by William G. Tued on February 13, 1927, as collateral to secure the payment of his note then held by defendant. At the time they were pledged they were substituted for other collateral which defendant then held to secure said note.

The sole question in the case is: At the time the bank re-

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The said question is the one set out in the above paragraph.

ceived from Wood the note, interest coupons and trust deed as collateral, and it received notice that plaintiff was the owner of the said instruments. Defendant claimed that it had no notice that plaintiff was the owner of the said instruments at the time it accepted them from Wood as collateral and it introduced evidence that supported this claim. Plaintiff claimed that he had given notice to the bank of his ownership of the said instruments prior to the time that the bank received them from Wood. Plaintiff and two other witnesses who gave evidence to support this claim were Greeks, and their testimony bearing upon the alleged notice, probably from their inability to clearly express their answers in English, is far from clear, and it entirely fails to satisfy us, in view of all the other facts and circumstances in proof, that the alleged notice was given to the bank. In our opinion, it would be unjust to allow the present judgment to stand on the evidence presented by the record. In the case may be tried again, we refrain from analyzing and commenting on the facts and circumstances bearing upon the question of the alleged notice.

Plaintiff contends that "the Statute provides that value must be given for the negotiable instrument when it is negotiated, in order to make the party receiving the same a holder in due course," and that "the defendant Bank did not give anything of value or consideration to Wood when it received the note from him." There is no merit in this contention. It appears in evidence that on February 13, 1927, when defendant received from Wood the note and interest coupons, the latter was indebted to it in the sum of \$12,000 for which it held collateral and that Wood on that date withdrew from the said collateral two mortgages, one signed by Henry W. Johnson in the amount of \$3,000 and the other signed by John E. Turnbull in the amount of \$1,500, and at the same time he substituted for these two mortgages the note, interest coupons and trust deed in question.

We are satisfied, after a very careful examination of the record, that the cause should be tried again. The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Finally, the last step in the process is to implement the plan and monitor the results. This involves putting the plan into action and tracking the progress of the solution. Once the problem has been solved, the final step is to evaluate the results and determine if the solution was effective. This involves comparing the results of the solution to the original problem and determining if the problem has been solved. If the problem has not been solved, the process may need to be repeated.

33914

34 A

OLIVER W. HOLMES, ALBERT E.
PYOTT, EDGAR G. STEARNS, as
Trustees,
Appellees,

v.

GREY GULL RECORDS, Inc., a
corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

257 I.A. 633²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Oliver W. Holmes, Albert E. Pyott and Edgar G. Stearns, as Trustees, plaintiffs, sued Grey Gull Records, Inc., a corporation, defendant, in the Municipal Court of Chicago in contract. The case was tried before the court without a jury. The court found the issues against defendant and assessed plaintiffs' damages at the sum of \$1,200. Defendant has appealed from the judgment entered upon the finding.

Plaintiffs' amended statement of claim states that their claim is upon a certain agreement entered into between plaintiffs and defendant on or about March 29, 1926, for the renting of certain space in the premises at 169-173 North Jefferson street, Chicago, for the term of one year from May 1, 1926, at a monthly rental of \$100; that defendant has not taken possession of the premises and has refused to do so, and has not paid any rent under the agreement; that plaintiffs have made a diligent effort to rent the premises to another tenant but have been unable to do so; that the premises were vacant during the entire term, to the damage of plaintiffs in the sum of \$1,500. In defendant's amended affidavit of merits it denies that it entered into the alleged agreement; admits that it did not take possession of the premises, and further admits that it refused to

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occupy the premises and refused to pay any rent therefor. It also sets up a defense based upon the Statute of Frauds. It further alleges that there were never any negotiations between defendant and plaintiffs of any kind or character in reference to the leasing of the premises in question.

The following are the material facts in the case: In February, 1926, Mr. Struckman, connected with the defendant company, called on Mr. Holmes, one of the plaintiffs, and stated that his company was looking for additional space and that he would like to look at the space in the basement of the premises in question; that they "went down and looked at it. Struckman said that it was just what he wanted. He told me at the time that he would take it and we discussed the matter in a general way, all of the details of it and how long he was to have it and the rent and all that, and told me that he would let me hear from him. I told him he would have to take it for a year." On March 22, 1926, Holmes received the following telegram:

"South Boston Mass Mar 22 26
HolmesPyott Co.
Attn Mr Holmes Chicago
Will take basement by May first if we can have for one
hundred Dollars monthly rental
Grey Gull Records."

On the same date, Holmes sent the following telegram:

"1926 Mar 22
Grey Gull Records,
So Boston, Mass
Will accept offer for basement you to pay additional for live
steam and power if required on fair basis.
Holmes Pyott and Co."

On March 24, 1926, Holmes sent the following letter:

"Holmes, Pyott & Company
159 No. Jefferson St.,
Chicago.

March 24th, 1926.

Grey Gull Records, Inc.
South Boston, Mass.
Gentlemen:

Confirming our wire to you accepting your offer of \$100.00 a month for the basement at 169-173 No. Jefferson St., as stated in our telegram if you desire us to furnish live steam for your

through the premises and refused to pay any rent therefor. It also sets up a defense based upon the Statute of Tenancy. It further alleges that there were no negotiations between defendant and plaintiff of any kind or character in reference to the leasing of the premises in question.

The following are the material facts in the case: In February, 1926, Mr. Stinson, connected with the defendant company, called on Mr. Holmes, one of the plaintiffs, and stated that his company was looking for additional space and that he would like to look at the space in the basement of the premises in question; that they went down and looked at it. Stinson then said that if they had what he wanted. He told me at the time that he would like to see the details of the matter in a general way, all of the details of it and how long he was to have it and the rent and all that, and told me that he would let me hear from him. I told him he would have to take it for a year." On March 22, 1926, Holmes received the following telegram:

"Boston Boston Mar 22 20
Holmes & Co.
After Mr. Holmes Chicago
This is to advise you that we have for one
month let you have the space in the basement of the premises in question for one year at the rate of \$100.00 per month. We will make other for basement you to pay additional for the space and power is required in this building.
Very truly yours,
Holmes & Co."

On the same date, Holmes sent the following telegram to the same party:

"First Mar 22
Very truly yours,
Mr. Holmes, Boston
We have for one month let you have the space in the basement of the premises in question for one year at the rate of \$100.00 per month. We will make other for basement you to pay additional for the space and power is required in this building.
Very truly yours,
Holmes & Co."

On March 22, 1926, Holmes sent the following telegram to the same party:

"Holmes, Boston & Company
210 N. Dearborn St.,
Chicago.
Very truly yours,
Mr. Holmes, Boston
We have for one month let you have the space in the basement of the premises in question for one year at the rate of \$100.00 per month. We will make other for basement you to pay additional for the space and power is required in this building.
Very truly yours,
Holmes & Co."

On March 22, 1926, Holmes sent the following telegram to the same party:

"Holmes, Boston & Company
210 N. Dearborn St.,
Chicago.
Very truly yours,
Mr. Holmes, Boston
We have for one month let you have the space in the basement of the premises in question for one year at the rate of \$100.00 per month. We will make other for basement you to pay additional for the space and power is required in this building.
Very truly yours,
Holmes & Co."

Kettles and power for your machinery, this will be charged for additional. We, of course, would expect to base our charge on the actual steam and power used.

If our understanding is correct please confirm by letter. It is understood you are to occupy this space as of May 1st.

Yours truly,
Holmes, Pyatt & Company
By O. W. Holmes."

On March 24 the following letter was sent:

"Grey Gull Records
Boston.

March 24, 1926.

Holmes Pyatt Co.,
159 North Jefferson St.,
Chicago, Ill.
Gentlemen:

I am enclosing herewith copy of night letter received from you today.

We are glad to know that you will lease the space in the basement which the writer was looking at for \$100 monthly. We will plan to take this space May first at which time we will have plans ready so that we can have our machines installed without delay. I may write you within a short time regarding matters in connection herewith, and trust that you will be kind enough to give me such information as I may wish on this subject.

Very truly yours,
Grey Gull Records, Inc.
Wm. Struckman
Distributing Mgr."

On March 29 the following letter was sent:

"Grey Gull Records,
135 Dorchester Avenue,
South Boston, Mass.

March 29, 1926.

Holmes, Pyatt & Company,
159 North Jefferson St.,
Chicago, Illinois.
Gentlemen:

We beg to confirm receipt of your letter of March 24th regarding rental of your basement at 169-173 North Jefferson Street at \$100.00 a month, and to advise that we consider this matter closed and that we shall expect to move in some time during the month of May or June.

We understand that the charge for steam and power used will have to be arranged later, and we do not doubt but that this will be arranged to mutual satisfaction.

Very truly yours,
Grey Gull Records, Inc.
Wm. Struckman,
Distributing Mgr."

On or about April 7, 1926, Holmes mailed to defendant a form of written lease wherein it was provided that plaintiffs, as party of the first part, leased the premises in question to defendant from May 1, 1926, until April 30, 1927, for \$1,200, payable in installments

...and power for your machinery. This will be charged
...of course, which is good to have and
...on the actual amount of power used.
...is an interesting and useful piece of literature.
...it is suggested you are to receive this copy as of May 1st.

Very truly yours,
John W. ...
By W. E. ...

On March 23 the following letter was sent:

"Very truly yours,
Boston."

March 23, 1900.

Belmont, Mass. ...
100 ...
...
...

I am enclosing herewith copy of my letter received from
your letter.

...to the fact that you will find the letter in the
...the letter was looking at the 100 ...
...will plan to take this space and find it ...
...I may write you within a short time ...
...in connection herewith, and trust that you will be kind
...to give me such information as I may wish on this subject.

Very truly yours,
John W. ...
W. E. ...
Belmont, Mass.

On March 23 the following letter was sent:

"Very truly yours,
Belmont, Mass."

March 23, 1900.

Belmont, Mass. ...
100 ...
...
...

...to confirm receipt of your letter of March 23rd
...of your payment of \$100-100 ...
...and as advised you are ...
...and that we shall expect to move in ...
...the month of May or June.
...the change for power and power ...
...and as to not being ...
...this will be arranged to mutual satisfaction.

Very truly yours,
John W. ...
W. E. ...
Belmont, Mass.

On March 23, 1900, ...

...is now provided for ...

...is ...

...\$1,000, ...

of \$100; it also contained a cancellation clause giving plaintiffs, as lessors, the right to cancel the lease on sixty days notice. This form was not signed by either party. On April 23, 1926, the following letter was sent to Holmes, Pyett & Company:

Grey Gull Records,
135 Dorchester Avenue,
South Boston, Mass.

April 23, 1926.

Holmes Pyatt & Co.,
Chicago, Illinois.
Gentlemen:

Attention - Mr. A. M. Pyatt

* * *

Am also enclosing herewith lease for space in basement of building known and numbered as 169-173 North Jefferson Street. In view of the fact that you have inserted a paragraph in this lease stating that it is understood and agreed that in case of sale of this property or extensive alterations to same party of the first part reserves the privilege of cancelling this lease on sixty days' written notice to the party of the second part, if we were to use this basement for the manufacture of phonograph records it will be necessary for us to expend a considerable amount of money for installation of machinery, and we do not wish to go ahead on that basis under those conditions. We will not be interested in the space at this time.

Very truly yours,

Grey Gull Records, Inc.
Wm. Struckman
Distributing Mgr."

Thereafter the following telegram was sent to defendant:

"1926 Apr 26

Grey Gull Records

135 Dorchester Ave South Boston Mass.

Clause in lease can be modified or omitted to suit you same was talked over when space was rented have missed definite opportunity of renting space at higher rental since leaving to your company expect you to carry out your contract.

Holmes Pyott and Co."

Thereafter the following telegram was sent by defendant:

"Pr South Boston Mass Apr 26 26

Holmes Pyott Co

Chicago

Our president left for Europe yesterday regret cannot make any changes in his decision

Grey Gull Records"

On the same date the following letter was sent to defendant:

of right is also contained in communication always giving assistance.

Furthermore, the right to remove the license on other days expires.

This form was not signed by either party. On April 23, 1933, the

Following letter was sent to Mr. J. J. Connelley

"Gray Bull Records,
138 Lombard Avenue,
South Boston, Mass.

- April 23, 1933.

Chicago, Illinois.
Chicago, Illinois.

Attention - Mr. A. J. Lyons

* * *

We also enclosing herewith find for space in payment of
rental known and numbered as 138-175 March 1933-1934.
The view of the fact that you have received a license in this
state stating that it is not necessary and agreed that in case of
this at this moment on exclusive license to some party of
the fact that reserves the privilege of continuing this license
to this party, which is the basis of the license.
It is not to be taken as a license for the same reason of the
license it will be necessary for us to remove a license
amount of money for installation of machinery, and we do not wish
to be asked on this basis under license conditions. We will not
be interested in the same as this state.

Very truly yours,
Gray Bull Records, Inc.
138 Lombard Avenue,
South Boston, Mass.

The following telegram was sent to Belmont:

"Lombard Apr 23

Gray Bull Records
138 Lombard Ave South Boston Mass.
Belmont in case can be modified or omitted to suit you and
we will over when you are ready have since Belmont
agreement of license and might want to have leaving to
last tonight report for no more and your contract.
Belmont Press and Co."

The following telegram was sent by Belmont:

"To South Boston Mass Apr 23 1933
Belmont Press and Co
Chicago

The following telegram was sent by Belmont
changes in his decision
Gray Bull Records"

The following telegram was sent by Belmont:

"Chicago, April 26th, 1926

Grey Gull Records, Inc.
135 Dorchester Ave
South Boston, Mass.
Gentlemen:

Confirming telegram sent you this morning relative to the space you have leased from us for one year from May 1st, 1926 which reads as follows:

'Clause in lease can be modified or omitted to suit you. Same was talked over when space was rented. Have missed definite opportunity of renting space at higher rental since leasing to your company. Expect you to carry out your contract.'

This lease was made with your company during the latter part of March; we have your letter and telegram stating that fact.

If you will authorize us to do so, we will make a special effort to re-lease these premises and credit you accordingly with whatever rent we can get for this space. Were it not so close to May 1st, when changes of this kind are usually made we could undoubtedly rent this space very promptly, but now, we presume that everybody who expects to move have already completed their arrangements.

Yours truly,
Holmes, Pyott & Company
By O. W. Holmes"

On the same date the following letter was sent to Holmes, Pyott & Company:

"South Boston, Mass.
April 26, 1926

Holmes Pyott Co.,
North Jefferson St.,
Chicago, Illinois
Gentlemen:

Your telegram of which we are enclosing copy was received and we are enclosing herewith also copy of our wire to you.

Our Mr. T. L. Shaw left for Europe yesterday and will be gone for several months. Before leaving he made the decision not to sign the lease on account of the clause, and the writer does not recall that this matter was mentioned during our conversation when looking at the basement. In view of the fact that Mr. Shaw decided not to do anything further in this matter regret that we are unable to make use of this additional space at this time.

Very truly yours,
Grey Gull Records Inc.
Wm. Struckman
Wm. Struckman
Distributing Mgr."

On May 4 the following letter was sent to Holmes, Pyott & Company:

"South Boston, Mass. May 4, 1926

Holmes, Pyott & Company
159 North Jefferson St.
Chicago, Ill.
Gentlemen:

Replying to yours of April 26th, we do not quite understand your attitude in this matter.

We do not wish to enter into legal proceedings on this matter if it can be avoided, but you understand that it was due

1907-1908

Very truly
yours,
J. Edgar Hoover

CONFIDENTIAL TELEPHONE TALK WITH THE WASHINGTON OFFICE OF THE FBI, APRIL 19, 1964, RE: THE ABOVE NAMED SUBJECT, AND THE FACT THAT THE ABOVE NAMED SUBJECT IS A MEMBER OF THE BLACK PANTHER PARTY, AND THAT THE ABOVE NAMED SUBJECT IS A MEMBER OF THE BLACK PANTHER PARTY, AND THAT THE ABOVE NAMED SUBJECT IS A MEMBER OF THE BLACK PANTHER PARTY.

'Change in laws can be modified or omitted at any time'

Some was talked over when needed. In 1941, 1942

...the opportunity of meeting with a higher power.

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

THE UNIVERSITY OF CHICAGO PRESS

It was with this intention that we have been able to secure the cooperation of the following persons:

1. Attached are two copies of the following items: a copy of the letterhead memorandum (LHM) dated 10/1/50, and a copy of the letterhead memorandum (LHM) dated 10/1/50, and a copy of the letterhead memorandum (LHM) dated 10/1/50.

02 800 66 700 : 80000 6149 207 5 : 800 00 0000 25798 6149 631w

... ..

[illegible]

4. The following information is provided for the year ended 31/12/2019:

177

Approved: _____

100-443887-100

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATIONS
455 FIFTH AVENUE
NEW YORK 17, N. Y.

... ..

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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that no alien who lives in a country at the time of the war

1992-1993

3000 and 10,000 ft. in diameter. The diameter of the

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1960. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1960. This has led to a concentration of the population in urban areas, which has had a number of important consequences for the development of the United States.

... ..

Very truly yours,

THE UNIVERSITY OF CHICAGO

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"THE DISCOURAGED"

say the following letter was sent to Holmes, dated 10/10/1931:

2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 26

1990-1991, 1991-1992, 1992-1993, 1993-1994, 1994-1995, 1995-1996, 1996-1997, 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021, 2021-2022, 2022-2023, 2023-2024, 2024-2025, 2025-2026, 2026-2027, 2027-2028, 2028-2029, 2029-2030, 2030-2031, 2031-2032, 2032-2033, 2033-2034, 2034-2035, 2035-2036, 2036-2037, 2037-2038, 2038-2039, 2039-2040, 2040-2041, 2041-2042, 2042-2043, 2043-2044, 2044-2045, 2045-2046, 2046-2047, 2047-2048, 2048-2049, 2049-2050, 2050-2051, 2051-2052, 2052-2053, 2053-2054, 2054-2055, 2055-2056, 2056-2057, 2057-2058, 2058-2059, 2059-2060, 2060-2061, 2061-2062, 2062-2063, 2063-2064, 2064-2065, 2065-2066, 2066-2067, 2067-2068, 2068-2069, 2069-2070, 2070-2071, 2071-2072, 2072-2073, 2073-2074, 2074-2075, 2075-2076, 2076-2077, 2077-2078, 2078-2079, 2079-2080, 2080-2081, 2081-2082, 2082-2083, 2083-2084, 2084-2085, 2085-2086, 2086-2087, 2087-2088, 2088-2089, 2089-2090, 2090-2091, 2091-2092, 2092-2093, 2093-2094, 2094-2095, 2095-2096, 2096-2097, 2097-2098, 2098-2099, 2099-2100, 2100-2101, 2101-2102, 2102-2103, 2103-2104, 2104-2105, 2105-2106, 2106-2107, 2107-2108, 2108-2109, 2109-2110, 2110-2111, 2111-2112, 2112-2113, 2113-2114, 2114-2115, 2115-2116, 2116-2117, 2117-2118, 2118-2119, 2119-2120, 2120-2121, 2121-2122, 2122-2123, 2123-2124, 2124-2125, 2125-2126, 2126-2127, 2127-2128, 2128-2129, 2129-2130, 2130-2131, 2131-2132, 2132-2133, 2133-2134, 2134-2135, 2135-2136, 2136-2137, 2137-2138, 2138-2139, 2139-2140, 2140-2141, 2141-2142, 2142-2143, 2143-2144, 2144-2145, 2145-2146, 2146-2147, 2147-2148, 2148-2149, 2149-2150, 2150-2151, 2151-2152, 2152-2153, 2153-2154, 2154-2155, 2155-2156, 2156-2157, 2157-2158, 2158-2159, 2159-2160, 2160-2161, 2161-2162, 2162-2163, 2163-2164, 2164-2165, 2165-2166, 2166-2167, 2167-2168, 2168-2169, 2169-2170, 2170-2171, 2171-2172, 2172-2173, 2173-2174, 2174-2175, 2175-2176, 2176-2177, 2177-2178, 2178-2179, 2179-2180, 2180-2181, 2181-2182, 2182-2183, 2183-2184, 2184-2185, 2185-2186, 2186-2187, 2187-2188, 2188-2189, 2189-2190, 2190-2191, 2191-2192, 2192-2193, 2193-2194, 2194-2195, 2195-2196, 2196-2197, 2197-2198, 2198-2199, 2199-2200, 2200-2201, 2201-2202, 2202-2203, 2203-2204, 2204-2205, 2205-2206, 2206-2207, 2207-2208, 2208-2209, 2209-2210, 2210-2211, 2211-2212, 2212-2213, 2213-2214, 2214-2215, 2215-2216, 2216-2217, 2217-2218, 2218-2219, 2219-2220, 2220-2221, 2221-2222, 2222-2223, 2223-2224, 2224-2225, 2225-2226, 2226-2227, 2227-2228, 2228-2229, 2229-2230, 2230-2231, 2231-2232, 2232-2233, 2233-2234, 2234-2235, 2235-2236, 2236-2237, 2237-2238, 2238-2239, 2239-2240, 2240-2241, 2241-2242, 2242-2243, 2243-2244, 2244-2245, 2245-2246, 2246-2247, 2247-2248, 2248-2249, 2249-2250, 2250-2251, 2251-2252, 2252-2253, 2253-2254, 2254-2255, 2255-2256, 2256-2257, 2257-2258, 2258-2259, 2259-2260, 2260-2261, 2261-2262, 2262-2263, 2263-2264, 2264-2265, 2265-2266, 2266-2267, 2267-2268, 2268-2269, 2269-2270, 2270-2271, 2271-2272, 2272-2273, 2273-2274, 2274-2275, 2275-2276, 2276-2277, 2277-2278, 2278-2279, 2279-2280, 2280-2281, 2281-2282, 2282-2283, 2283-2284, 2284-2285, 2285-2286, 2286-2287, 2287-2288, 2288-2289, 2289-2290, 2290-2291, 2291-2292, 2292-2293, 2293-2294, 2294-2295, 2295-2296, 2296-2297, 2297-2298, 2298-2299, 2299-2300, 2300-2301, 2301-2302, 2302-2303, 2303-2304, 2304-2305, 2305-2306, 2306-2307, 2307-2308, 2308-2309, 2309-2310, 2310-2311, 2311-2312, 2312-2313, 2313-2314, 2314-2315, 2315-2316, 2316-2317, 2317-2318, 2318-2319, 2319-2320, 2320-2321, 2321-2322, 2322-2323, 2323-2324, 2324-2325, 2325-2326, 2326-2327, 2327-2328, 2328-2329, 2329-2330, 2330-2331, 2331-2332, 2332-2333, 2333-2334, 2334-2335, 2335-2336, 2336-2337, 2337-2338, 2338-2339, 2339-2340, 2340-2341, 2341-2342, 2342-2343, 2343-2344, 2344-2345, 2345-2346, 2346-2347, 2347-2348, 2348-2349, 2349-2350, 2350-2351, 2351-2352, 2352-2353, 2353-2354, 2354-2355, 2355-2356, 2356-2357, 2357-2358, 2358-2359, 2359-2360, 2360-2361, 2361-2362, 23

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RECEIVED THE SECRETARY OF THE ARMY
WASHINGTON, D.C.

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THE UNIVERSITY OF CHICAGO

1940-1941

to the clause in the lease that our president, Mr. T. L. Shaw decided not to sign that, and until such time as we have signed the lease you will also understand that we are not legally responsible in any way.

We sincerely hope that you will not suffer any loss in connection with this matter.

Very truly yours,
Grey Gull Records, Inc.
Wm. Struckman
Wm. Struckman
Distributing Mgr."

On May 19 the following letter was sent to defendant:

"Chicago, May 19th, 1926

Grey Gull Records, Inc.
South Boston, Mass.

Attention Mr. Struckman

Gentlemen: Distributing Manager

Your letter of May 4th, 1926 in reply to our letter of April 26th was received while the writer was out of the city. We regret exceedingly to have any misunderstanding with you as it is the least of our desires to enter into any litigation over the question of your renting from us the basement space at 175 N. Jefferson St.

To our way of thinking, there is no doubt that the Grey Gull Records definitely rented this space from us during the latter part March to be effective May 1st and that we can hold them to their contract.

In regard to the clause in the lease that you questioned, we offered to eliminate or modify same, to suit you, by wire on receipt of your letter stating that you did not wish to carry out the lease on account of such clause. We have no prospects of selling our property or any intention of tearing it down so that this would not be a matter for any serious concern.

It seems to us that the sensible thing to do would be to rent this space at the first opportunity providing you authorized us to do so and for your company to make up for any loss that you will cause us. We have not put a 'For Rent' sign on this space as we consider it is rented to you.

The contract made with you for this space was for a period of one year. If the expense of installing your machinery was so great we think you would have wanted to make a lease for a longer period than a year. There must have been some other reason for you changing your mind in connection with this matter other than the sixty day clause in the lease.

Please give this matter your reasonable consideration to which we believe it is entitled before replying.

Thanking you for your past courtesies, we remain

Yours truly,
Holmes, Pyott & Company
By O. W. Holmes"

Defendant contends that "a contract for the rental of premises for a term of one year to begin in the future is within the Statute of Frauds and no action can be maintained thereon unless there is a memorandum in writing containing all the essential terms

of a lease signed by the party to be charged or by some other person by him lawfully authorized;" and that "there was no meeting of the minds and no contract existed. The intention of the parties, ascertained from the negotiations and correspondence, contemplated the execution of a lease, which when submitted was a counter offer;" and it further contends "that the negotiations had and the letters and wires exchanged did not constitute a valid contract."

Plaintiffs contend that "a contract for rental of premises for the term of one year, to begin in the future, is not within the Statute of Frauds, where there is a memorandum in writing, or a series of memoranda in writing connected with and referring to each other, containing all of the essential elements of the lease, and such memorandum or memoranda, or parts thereof, are signed by the party to be charged or by ^{some} other person by him duly authorized;" and that "to take the case out of the Statute of Frauds, we rely upon documentary evidence of letters, telegrams and a form lease, unexecuted by defendant, but referred to in a letter signed by defendant." The position of plaintiffs is that prior to the submission of the written form of lease to defendant there was a valid and binding contract in existence; that by defendant's letter of March 29 the deal was consummated; that the sixty days cancellation clause contained in the form of lease submitted by plaintiffs to defendant was not a part of the consummated contract and that the submission of the written lease, containing this clause, to defendant, was not in the nature of a counter offer but that it amounted to an attempted novation, by plaintiffs, of the contract already entered into; but that the attempted novation, in view of the refusal of defendant to accept the same, did not have the effect of destroying the contract already entered into. When the undisputed facts are considered, together with the original statement of claim, it seems clear to us that the present theory of plaintiffs as to the so-called attempted novation is an afterthought, and that as a matter

of a letter signed by the party to be charged or by some other person
by him lawfully authorized; and that "there was no meeting of the
minds and no contract entered into. The intention of the parties,
ascertained from the negotiations and correspondence, contemplated
the execution of a lease, which when executed was a counter offer,"
and it further recites "that the negotiations had and the parties
and were exchanged his most confidential and valid contract."
Plaintiff claims that "a contract was made of purchase
for the term of one year, to begin in the future, in and within the
State of Texas, where there is a memorandum in writing, in a letter
of memorial in writing connected with and referring to each other,
containing all of the essential elements of the lease, and such
memorandum or memoranda, or parts thereof, as signed by the party
to be charged or by ^{some} other person by him duly authorized; and that
to take the case out of the Statute of Texas, we rely upon the following
evidence of letters, telegrams and a lease lease, introduced by defendant
and, but referred to in a letter signed by defendant." The position
of plaintiff is that, giving to the admission of the writer of the
lease to defendant there was a valid and binding contract in evidence;
that by defendant's letter of March 22 the deal was consummated; that
the lease duly executed and delivered in the form of lease and
signed by plaintiff to defendant was not a part of the consummated
contract and that the admission of the writer of the lease, containing the
lease, to defendant, was not in the nature of a counter offer but that
it amounted to an attempted revocation, by plaintiff, of the contract
already entered into; but that the attempted revocation, in view of the
refusal of defendant to accept the same, did not have the effect of
annulling the contract already entered into. That the attempted
revocation was consummated, together with the original statement of claim,
is shown also by the present theory of plaintiff as to the
revocation attempted revocation in an affidavit, and that as a matter

of fact they, as well as the defendant, contemplated from the beginning of the negotiations that there should be a written lease that would contain the final agreement of the parties. The verified original statement of claim, which was filed August 26, 1926, proceeded upon the theory that defendant agreed to lease the premises in question, but that it had not leased them in accordance with the agreement and that it refused to lease them although requested so to do. This theory was abandoned and the case was tried upon the amended statement of claim filed January 7, 1929. Mr. Holmes testified that he told Mr. Struckman that it was their custom "to make a year's lease," and he further testified that when the form of lease was sent by plaintiffs to defendant it had not been signed by plaintiffs for the reason that it was their custom to obtain the signature of the lessee to the instrument before they signed it. That plaintiffs still urged defendant to sign the lease, even after the latter had refused to do so, appears from their telegram of April 26, 1926, and their letter of the same date, wherein they say: "Clause in lease can be modified or omitted to suit you." In their brief plaintiffs say: "In the case at bar, the record shows a series of connected letters and telegrams all signed and a lease setting forth the contract of the parties. This lease constituted a part of the memorandum for the purpose of satisfying the requirements of the Statute of Frauds." The form of lease fixes the term from May 1, 1926, to April 30, 1927, and it is only by a reference to this document that plaintiffs are able to supply the term of one year for the alleged rental contract.

After a careful consideration of the question involved in the present appeal, we have reached the conclusion that there was no meeting of the minds of the parties; but even if it be assumed that plaintiffs, after the receipt of defendant's letter of March 29, 1926, would have had the right to consider the deal consummated,

nevertheless, they did not see fit to do so, but, on the contrary, they continued negotiations and made a counter proposition, which was refused, and therefore no contract existed between them. Under the undisputed facts in the case and the law, plaintiffs are not entitled to recover, and the judgment of the Municipal Court of Chicago is reversed.

REVERSED.

Barnes, P. J., and Gridley, J., concur.

[illegible]

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1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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DR. A. H. WADDINGTON and
MRS. A. H. WADDINGTON,
Appellees,

v.

L. W. KEEFE, doing business
under the name and style of
Superior Roofing Company,
Appellant.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

257 1A 633³

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

Dr. A. H. Waddington and Mrs. A. H. Waddington sued L. W. Keefe, doing business under the name and style of Superior Roofing Company, in an action of assumpsit. Defendant (petitioner in the present proceeding) was defaulted on December 6, 1928, and on July 11, 1929, there was an ex parte hearing before the court, with a jury. A verdict was returned in favor of plaintiffs (respondents in the present proceeding) fixing their damages at the sum of \$5,000. On the same day judgment was entered on the verdict. On August 14, 1929, petitioner filed his sworn petition in the nature of a writ of error coram nobis, praying that the judgment be vacated and the verdict of the jury set aside and that petitioner be given leave to plead to the declaration. Petitioner then moved the court to enter a rule upon respondents to plead to the petition within a short day. This motion was denied and thereupon respondents made an oral motion "that the petition be denied and dismissed," which motion was granted. From the order dismissing the petition, petitioner has appealed.

Petitioner contends that his sworn petition made out a

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1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

THE UNIVERSITY OF CHICAGO PRESS

1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 2684-2685, 2686-2687, 2688-2689, 2690-2691, 2692-2693, 2694-2695, 2696-2697, 2698-2699, 2700-2701, 2702-2703, 2704-2705, 2706-2707, 2708-2709, 2710-2711, 2712-2713, 2714-2715, 2716-2717, 2718-2719, 2720-2721, 2722-2723, 2724-2725, 2726-2727, 2728-2729, 2730-2731, 2732-2733, 2734-2735, 2736-2737, 27

in the present proceedings) was obtained on November 14, 1944, and
on July 11, 1945. There was no further action taken against

with a view to the

1. General Information (Name, Address, Phone Number, etc.)

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or further information, please call 1-800-451-4511 or write to: American Red Cross, 1700 M Street, N.W., Washington, D.C. 20036.

Source: *U.S. Census Bureau, Bureau of Economic Analysis, "Gross Domestic Product by State, 1997-2000,"* <http://www.bea.gov/states/gdp>.

Abstracts of studies on the role of the family in the development of the child are available from the following sources:

... ..

Journal of Management Education 27(6)p. 689-703

... ..

prima facie case, entitling him to relief under section 89 of the Practice act and that the trial court erred in denying his motion for a rule upon respondents to plead to the petition and in dismissing his petition. Petitioner was a roofer, and respondents, in their declaration in the original suit, alleged that they had a written contract with him by which he was to repair the roof on certain premises owned by them for the stipulated sum of \$813, and that petitioner guaranteed the work for a period of five years and agreed that should any leaks develop in the roofing he would repair the same without charge; and respondents farther alleged that petitioner did the repairing in such a negligent and unworkmanlike manner that the roof leaked and permitted water to seep through the leaks into the premises and that as a result respondents suffered damages to the amount of \$5,000. The petition alleges (inter alia) that on July 31, 1928, petitioner was served with a summons in the suit of respondents against him and that he immediately went to the home of respondents and there had a conversation with Mrs. Waddington, one of the respondents, in which he stated to her "that he was ready, able and willing to make right any claim they had of defect in his workmanship or materials with reference to said roof on their home, and that Mrs. L. M. Waddington, Plaintiff, acting on her own behalf and on behalf of both plaintiffs, then and there agreed with this petitioner that if he would repair said roof the suit would be dropped and dismissed by the plaintiffs without any need for petitioner to give further attention to said suit; that on the following Saturday, August 4, 1928, petitioner and his workman went to the home and residence of the plaintiffs and then and there repaired the roof in the presence of the plaintiffs, who were then and there present inspecting said work and said roof; that further work was done in

[illegible]

August and again, in October, a complete new flat roof was laid and constructed with the approval of the plaintiffe, prior to the return date of summons in this suit; that since that date no complaints have been received with reference to said roof and petitioner was well assured and believed that no further attention to said matter was required of him and gave the matter no further thought until the receipt of said execution on August 9, 1929;" "that on August 5, 1929 he received execution issued out of the Office of the Clerk of this Court in the above case and immediately applied for assistance in preparing and presenting this petition; that prior to the receipt of said execution he had no notice of the supposed judgment which he is now informed appears on the records as having been entered July 11, 1929." In McGard v. Briggs & Turivas, 333 Ill. 158, 166, the court said:

"The office of the writ of error coram nobis is to bring to the attention of the court errors of fact, such as the death of either party pending the suit and before judgment therein, or infancy where the party was not properly represented by guardian, or coverture where the common law disability still exists, or insanity at the time of the trial, or a valid defense existing in the facts of the case but which, without negligence on the part of the defendants, was not made, either through duress or fraud or excusable mistake, such facts not appearing on the face of the record, and such, if known by the court, would have prevented the rendition and entry of the judgment." (italics ours.)

To the same effect is Jacobson v. Ashkinaze, 237 Ill. 141, 146. In Harman v. North American Life Ins. Co., 212 Ill. App. 389, 398, the court said:

"The fraud which may be set up and urged as a basis for the granting of such a motion is fraud which has caused the defendant to omit entering an appearance or filing a plea or interposing a defense or the like. Where one has not been negligent but, through some trick or fraud practiced by the plaintiff, he has been lulled into a feeling of security and led to forego taking steps to defend the action brought, and, as a result, the judgment has been entered, such fraud may be urged as the basis for a motion in the nature of a writ of error coram nobis, after the judgment term has expired, and in this way the judgment may be set aside. Pisan v. Rzek, 206 Ill. 344, 345."

We are satisfied that the petition made out a prima facie case of fraud, entitling petitioner to relief under section 89, and that the trial court erred in denying the motion of petitioner for a rule upon respondents to plead to the petition and in entering an order dismissing the petition.

The judgment order of the Circuit court of Cook county dismissing the petition is reversed and the cause is remanded with directions to the trial court to enter a rule upon respondents to plead to the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Gridley, J., concur.

It was pointed out that the evidence was not sufficient to show that the defendant was guilty of the crime charged. The jury was instructed to acquit the defendant if they found the evidence insufficient to prove guilt beyond a reasonable doubt.

The judgment of the court was affirmed. The defendant was sentenced to the State Prison for a term of five years.

The court further stated that the evidence was not sufficient to show that the defendant was guilty of the crime charged. The jury was instructed to acquit the defendant if they found the evidence insufficient to prove guilt beyond a reasonable doubt.

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34020

FRANK TRAPP,

Appellee,

vs.

ROMAN KESTIAN and MALGORZATA
KESTIAN,

Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

252 LA. 533

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, Frank Trapp obtained a judgment by confession, on a promissory note, on August 8, 1929, for the sum of \$1,421.80, against Roman Kestian and Malgorzata Kestian. On September 10, 1929, defendants filed a sworn petition, under Section 21 of the Municipal Court Act, praying that the judgment be vacated and defendants allowed to plead to the declaration. The court denied the prayer of the petition and defendants have appealed.

The petition alleged that about May 29, 1928, plaintiff and defendants entered into a written lease for the rental of the premises, 4211 and 4213 South Marshfield avenue, to be occupied for a soft drink parlor, living rooms and storage for fuel, and for no other purposes; that the term of the lease commenced on June 1st, 1928, and expired on May 31, 1931, and that the rental was fixed at \$100 per month; that at the time of the execution of the lease, and in connection with the rental of the premises, plaintiff and defendants entered into a written agreement wherein it was provided that "for the faithful performance of the terms and conditions of said lease" defendants were to deposit in the Depositors State Bank of Chicago a certain judgment note, payable to plaintiff, for the sum of \$1,200, which note and written agreement were thereupon deposited in escrow in said bank; that it was provided in the agreement that in the event the defendant Roman Kestian violated either the Illinois Prohibition Law or the Federal Prohibition Law then the bank was

"authorized to collect" from defendants the sum of \$1,000, as represented by the note, and was further authorized to pay out of the proceeds of the note, to plaintiff, rental for the premises at the rate of \$100 per month for each and every month that they might be closed on account of such violation; that if there were no charges or complaints pending against defendants or their assignees under the lease on May 31, 1931, then the note of \$1,000 should be returned to defendants; that in case there were no violations of the Prohibition Act by defendants, then if defendants or their assignees should pay to plaintiff all rents which should become due and payable under the lease and should pay all fines, costs and charges which might be assessed against either of the parties by reason of any violation of the Prohibition Act, and in case no charges, or order to close the premises, or injunction against the premises were pending in any court of record in Cook County on May 31, 1931, the note for \$1,000 should be returned to defendants. The petition further alleges that defendants were induced to sign the note by plaintiff; that defendants do not read or write the English language and did not read the agreement nor the lease; that neither the lease nor the agreement was explained or interpreted to them and that they relied solely upon the honor and integrity of plaintiff to protect their interest; that plaintiff, in the negotiations, was represented by an attorney, but defendants were not, as plaintiff stated to them that they had known one another for twenty years and that defendants did not need an attorney as they could rely upon him to protect them in the premises; that plaintiff was fully cognizant of the purpose for which said premises were rented and operated; that prior to the time of the prosecution of defendant Roman Jectian by the United States Government, plaintiff on diverse occasions sent his daughter to said defendant's place of business, which was next door to where plaintiff resided, for the purpose of

procuring liquor from said defendant on the pretense that someone was sick in plaintiff's house, and that said defendant was induced by the solicitation of plaintiff's daughter to give her liquor for medicinal purposes; that plaintiff called at said defendant's place of business on more than a dozen occasions and that on such occasions he induced the bartender of said defendant to give him liquor without said defendant's knowledge; that in September, 1928, plaintiff "brought into defendant's (Ramon Restian's) place of business two men, one of whom had a check and desired him to cash it, amounting to One Hundred Dollars, and that the said Frank Trapp asked defendant to cash said check, saying that he himself would cash it but he did not have any cash on hand at the time, and that if defendant would cash the check the payee would buy drinks at defendant's place of business, and that thereupon Ramon Restian did cash said check in the presence of said Frank Trapp and some liquor was given away to said Frank Trapp in the presence of said Frank Trapp;" that in October, 1928, defendant Ramon Restian was arrested for an alleged violation of the Federal Prohibition Law and was fined \$180; that plaintiff knew the character of the business that said defendant was operating at the place in question and from time to time plaintiff brought friends of his to the place for the purpose of having said defendant supply them with liquor; that plaintiff, before he would allow defendants to enter the premises under the lease, required them to deposit with plaintiff \$1,000, which plaintiff still has and which he owes defendants and which sum "is a legal set-off to any sum which might be found to be lawfully coming to said Frank Trapp;" that plaintiff is also indebted to defendants in the amount of \$104 for beer coils, \$26 for sink, \$10 for hot water, and \$10 for sink "put into said premises by appellants at appellee's special instance and request."

Defendants contend that the court erred in denying the prayer of their petition and they have argued, with force, a number of grounds in support of this contention. Plaintiff admits, as he must, that if the sworn petition sets up a prima facie defense to plaintiff's claim, the trial court should have granted defendants leave to plead to the declaration. We are satisfied, after a careful examination of the allegations in the petition, that the trial court erred in denying the prayer of the petition for leave to plead. Section 21 provides that if the petition sets forth grounds for vacating, setting aside or modifying the judgment "which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity," the judgment may be vacated, set aside or modified. The petition alleges that plaintiff was fully cognizant of the purposes for which the premises were rented and knew the illegal character of the business conducted in the premises, and that he aided, abetted and encouraged Roman Kestian in the violation of the Federal Prohibition Law. In fact, the petition alleges that defendant Roman Kestian was arrested for a violation of the Federal Prohibition Law shortly after plaintiff had induced said defendant to violate the law. Under such a state of facts the lease in question would be void, and also the escrow contract, which was executed solely to insure the faithful performance of the terms and conditions of the lease. This contract provided that the bank could not "collect" the judgment note unless the terms of the contract were violated. "The difference of opinion as to whether a contract is invalidated by the mere knowledge by one of the parties of the other's unlawful intention, does not extend to participation in such intention. Even courts which entertain the view that mere knowledge is insufficient agree that participation in the unlawful intention renders the contract illegal." (5 R.C.L. 697.) Many cases might be cited in support of this settled principle of law.

Delegation advised that the court was in session and
group of their petition and they have asked, when asked, a number
of grounds in support of this contention. It is
must, that in the event petition was not granted, the
petitioner's claim, the trial court should have granted
leave to place on the petition. It was suggested, when a case
was submitted to the Commission for its consideration, that the
court would in denying the prayer of the petition for leave to
present, stating it is possible that it was possible that the
the petition, stating that of modifying the law and that would
be sufficient to make the law to be revised, and asked to explain
by a bill in committee, and however was to be revised, the bill to
modified. The petition alleged that of modifying the law and that would
of the petition for which the petition was granted and that the
alleged character of the petition submitted in the petition, and
that he asked, stated and suggested how to proceed in the petition
of the petition for which the petition was granted and that the
petitioner's claim was presented for a violation of the law
The petition law committee after hearing the petition and the
to violate the law. When asked a copy of the law was given to the
law would be void, and when the petition was granted, when was granted
would be to have the petition for which the petition was granted
claim of the law. This committee suggested that the law would not
"violated" the petition was granted and that the petition was
violated. The committee on petition on the petition a petition is
invaluable by the law committee by one of the petition on the
either a petition on the petition, when was granted and that the
even intention. When asked what intention the law was
knowledge in intention on the petition on the petition on the petition
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cases might be cited in support of this petition on the petition on the petition

The petition also alleges that plaintiff has on deposit \$1,000 which he owes defendants; also that he is indebted to defendants for various sums for improvements put into the premises by defendants at plaintiff's special instance and request. It would be highly inequitable to prevent defendants from interposing these set-offs to any legal claim which plaintiff might prove against them.

The order of the Municipal Court of Chicago denying the prayer of the petition of defendants is reversed and the cause is remanded with directions to the court to allow defendants to plead to the declaration, the judgment to stand as security.

REVERSED AND REMANDED
WITH DIRECTIONS.

Barnes, P. J., and Gridley, J., concur.

The position also alleged that on January 12, 1947, which
in every instance; also that in the instance of the
further more the Government was not the possessor of
of Plaintiff's special notebook and was not. It would be highly
impossible to prove that the Government was not the
in any case where Plaintiff's notebook was again found.
The issue of the Government's possession of Plaintiff's
the proper of the position of Plaintiff is referred to the court
is presented with reference to the court of law which is
given to the Government, the Plaintiff is given an opinion.

WITNESSES AND JURY
-17-

James, Jr., and others, U.S. District

33591

WILLIAM EUGENE LESLIE by
Addie Miller, his next friend,
Appellee,

vs.

CITY OF CHICAGO, a Municipal
Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

253 Ill. 633

MR. PRESIDING JUSTICE ROSENBERG
DELIVERED THE OPINION OF THE COURT.

June 19, 1925, William Eugene Leslie (hereafter called plaintiff), then 16½ years of age, was thrown from an automobile in which he was riding on Prairie avenue in Chicago and injured. He brought suit, claiming that the accident was caused by the condition of the street. Upon trial he had a verdict and judgment for \$4,000. Defendant seeks a reversal.

This case has already been before this court (249 Ill. App. 649.) Upon the first trial a peremptory instruction was given to find for the defendant. We reversed the judgment on the ground that the court improperly excluded evidence tending to show the condition of the street and that the peremptory instruction should not have been given. Counsel in their briefs are silent with reference to the fact that the case was formerly before us. Where this is the fact such information should always be given in the briefs at the outset.

The accident happened about opposite number 4510 or 4020 Prairie avenue. Witnesses testified that at this point in the street there were a number of holes, approximating 10 inches by 3 feet in extent and from 2 to 4 inches deep; that there were about 15 such holes in that block and that this had been the condition of the street for a year or two.

Defendant makes only two points: (1) that plaintiff's own negligence caused him to fall from the car; and (2) that the amount of the verdict is excessive.

The accident happened in the afternoon. The automobile

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

TO: DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
FROM: SAC, NEW YORK (100-100000)
SUBJECT: [REDACTED]

101-102-103-104-105-106-107-108-109-110-111-112-113-114-115-116-117-118-119-120-121-122-123-124-125-126-127-128-129-130-131-132-133-134-135-136-137-138-139-140-141-142-143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-1021-1022-1023-1024-1025-1026-1027-1028-1029-1030-1031-1032-1033-1034-1035-1036-1037-1038-1039-1040-1041-1042-1043-1044-1045-1046-1047-1048-1049-1050-1051-1052-1053-1054-1055-1056-1057-1058-1059-1060-1061-1062-1063-1064-1065-1066-1067-1068-1069-1070-1071-1072-1073-1074-1075-1076-1077-1078-1079-1080-1081-1082-1083-1084-1085-1086-1087-1088-1089-1090-1091-1092-1093-1094-1095-1096-1097-1098-

UNIVERSITY MICROFILMS
SERIALS ACQUISITION
300 N. ZEEB RD.
ANN ARBOR MI 48106

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

of the street. When first he had a vehicle and he was the only one of the street. When first he had a vehicle and he was the only one of the street.

This case has already been heard and once this

1972 The first National Conference on the Environment was held in Washington, D.C. in 1972. It was the first time that a national conference on the environment was held in the United States.

The above information was obtained from the files of the FBI, New York Office, dated 10-18-67.

been given. Comments in these letters are almost all references to the fact that the case was formerly before the House and in the last

[illegible]

There was a number of other, important things he learned by 1960 in a
 Wichita Avenue. Wisconsin furnished him at this point in the story

at that time and that the defendant was not in the area of the crime at that time.

Dependent upon only two points. (1) that the

... at 1000 ft ...

was an open touring car. James Fitzgibbons was in the front seat driving and beside him sat Martin Hogan. Plaintiff was sitting in the back seat. He testified that they were going about 30 miles an hour; that, as they were in the block between 40th and 41st street the automobile hit two large holes; that when the first hole was struck he was given "an awful jolt" and was bounced back; that in about a second or two the automobile hit a second hole and he was thrown from the car. Defendant attempted to show that Fitzgibbons and Hogan had stated at the hospital to which plaintiff was taken that he was thrown from the car as he was attempting to go from the rear seat to the front. Plaintiff denied that he was thrown while attempting to move. Hogan testified to the same effect. Fitzgibbons said plaintiff was standing up just before the accident.

The questions involving the facts as to the occurrence were properly submitted to the jury. The evidence tended to show that the condition of the street was the sole cause of the accident and the verdict of the jury in this respect is not manifestly against the weight of the evidence.

We cannot say that the amount of the verdict was excessive. Plaintiff was unconscious when he arrived at the hospital and remained in that condition from 36 to 48 hours. The doctor testified that he found a depressed fracture of the outer table of the skull together with lacerations of the scalp. Prior to the injury plaintiff was in good health, but since that time he has suffered from pains in the head. Subsequently he worked for the Pullman Company and at the time of the trial was a fireman for the Northwestern Railroad.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

55680

CHARLES E. SNOVILLY,
Appellant,

vs.

W. F. COTTON,
Appellee.

47
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

257 L.A. 634

MR. PRESIDING JUSTICE RESURELY
DELIVERED THE OPINION OF THE COURT.

Upon the trial of an action in forcible entry and detainer for the possession of a store at 153 North Oak Park avenue, Oak Park, Illinois, the jury returned a verdict for the defendant. Plaintiff appeals from the adverse judgment.

Defendant was a tenant of plaintiff under a lease and the question involved is whether an option for a renewal, which is written in defendant's copy of the lease but not in plaintiff's copy, is effective. February 1, 1917, a written lease was entered into between the parties, executed in duplicate, for a term of ten years from May 1, 1917, to April 30, 1927; rental \$50 a month for the first two years, \$65 a month for the next three years and \$70 a month for the last five years, payable in advance. At the expiration of this term plaintiff demanded possession, but defendant refused to surrender claiming the right to occupy under the alleged option for renewal in question.

The lease was negotiated on behalf of plaintiff by Dunlop & Company, real estate agents, through John L. Pearson, a member of the real estate firm. Pearson died in 1922 and O. C. Braese succeeded to the business of Dunlop & Company and thereafter represented plaintiff.

Upon the trial plaintiff introduced a copy of the lease signed by Charles E. Snovilly by Dunlop & Company as agents and by the defendant; also evidence of a demand for possession and evidence that defendant still continued in possession after the term of the lease.

To meet the prima facie case made by plaintiff defendant offered in evidence, after objections thereto had been overruled, the copy of the lease retained by him. The leases are the same in all respects except that defendant's copy contains the following words typewritten in a blank space:

"In consideration of Seventy-five Dollars (\$75.00) in hand paid, it is agreed the said lessee has the option of renewal of this lease at the same scale of increase in rental by giving thirty days' notice. Said payment is for the May rent, 1927."

There was thus raised a question of fact as to whether these words had been inserted in defendant's copy before the leases were executed and with the consent of plaintiff's agent or whether they had been inserted by defendant or by some one at his instance after the leases had been executed and without the knowledge and consent of plaintiff or his agent.

Plaintiff makes the point that there was no evidence that Dunlop & Company had written authority to make the lease for more than one year, as required by the Statute of Frauds, and that the authority of an agent to make leases does not include the authority to give options for renewals. We are of the opinion that these points cannot prevail. Defendant originally came into possession of the premises as an assignee of a lease by plaintiff to the Chicago Telephone Company, made with the consent of plaintiff by Dunlop & Company, agents. Attached to the lease so assumed by defendant is a letter signed by plaintiff personally, stating that Dunlop & Company were his authorized agents "in handling my property, making leases and receiving for rents on Oak Park property." This was a sufficient instrument in writing executed by plaintiff to give Dunlop & Company authority to make the lease. Furthermore, plaintiff accepted defendant as a tenant under the lease for ten years together with the rent for this period. He cannot now be heard to question his agent's authority to make the lease.

The cases presented by plaintiff to support the proposition that the authority to execute defendant's lease did not include

in a black dress:

except that Salim's wife wanted the clothing to be black.

The issue related by Mrs. The issue was the same in all respects.

However, after objections there was some discussion. The way of

To meet the issue there was by agreement between the parties in

[illegible]

There was some initial discussion of this as to whether these words had been included in Tolstoy's early letters. The answer was expected and also the manner of Tolstoy's reply to Tolstoy. They had been included by Tolstoy in his early letters. After the passage had been reviewed and found to be accurate and

The above presented by Plaintiff be removed the grounds - cannot now be heard in connection with agent's testimony to make the same the same for an year's period with the year for sale period. The lease, however, Plaintiff notified Defendant in a formal letter issued by Plaintiff to the Defendant a company's testimony to make the on the same property." This was a written statement in writing signed "in handling my property, which lease was executed by the Plaintiff personally, stating that during a company with the Plaintiff attached to the lease as executed by Defendant in a letter issued by Defendant to the lease as executed by Defendant in a letter issued by Plaintiff, with the amount of \$100.00 by Plaintiff, which, after an analysis of a lease to Plaintiff to the Chicago Telephone Company, Defendant stipulated to the lease as executed by the Plaintiff, Defendant for renewal. In view of the opinion that these parties should of an agent to make lease was not located the Plaintiff in this one year, as required by the contract of the lease, and that the Plaintiff during a company had written agreement to make the lease for sale period Plaintiff makes the same that there was no evidence that

authority to give an option to renew are not controlling. They are, for the most part, cases where the agent's authority was specifically limited to do a particular thing. The letter above referred to does not place any restriction or limitation upon the authority of Dunlop & Company "in handling my property, making leases," etc. It appears that plaintiff lives a large part of the time in California, which would lead to a reasonable inference that his real estate agents here would have general powers with reference to leasing his real estate. Furthermore, if there were any limitations on the agent's authority, such limitations were within the control of plaintiff, and his failure to produce the same leads to the inference that there were no such limitations. Cartier v. Troy Lumber Co., 138 Ill. 535; E. & W. I. R. Co. v. Kewell, 113 Ill. App. 263.

It is next said that the option clause is so indefinite as to be unenforceable and void. We do not find nor would we expect to find any decided case construing the identical language in the instant clause. While the language of the clause is not the clearest and most definite, yet we are of the opinion that the words, "the option of renewal of this lease" implies a renewal for the same term as the original lease, namely, for ten years. Kern v. Di Lorenzo, 95 Conn. 267; Kollock v. Scribner, 96 Wis. 104. The rental can also be determined. The language of the clause is that the rental shall be "at the same scale of increase" and the rental for the first month of the renewal term is stated as \$75. The same scale of increase for the renewal rental, as was provided for in the prior lease, would call for \$75 a month for the first five years, \$80 a month for the next three years and \$85 a month for the next five years. We hold that the clause is sufficiently definite, both as to the term and the rental. It is admitted that the defendant gave the necessary thirty days notice prior to April 30, 1927.

authority to give an opinion as to whether or not the
for the most part, cases where the agent's authority was specifically
limited to do a particular thing. The latter above referred to cases
not place any restriction at limitation upon the authority of agent
a Company "in handling my property, making loans," etc. It is
that plaintiff lives a large part of the time in California, where

would lead to a reasonable inference that his acts would be done here
would have general power with reference to handling his real estate.
Furthermore, it there were any limitations on the agent's authority,
such limitations were within the knowledge of plaintiff, and his fail-
ure to produce the same leads to the inference that there were no
such limitations. Smith v. Smith, 100 Cal. 111, 33 P. 2d 111.

It is now said that the opinion should be so interpreted
as to be inconsistent and void. It is not so. It would be wrong
to find any isolated cases concerning the identical language in the
instant case. While the language of the opinion is not the same
and most definite, yet we are of the opinion that the words "the
option of renewal of this lease" implied a renewal for the same term
as the original lease, namely, for ten years. Smith v. Smith, 100 Cal. 111, 33 P. 2d 111.
Notwithstanding the language of the opinion it may be said that the
of the same scope of interpretation and the result for the first time
of the renewal term is stated as 10 years. The same scope of interpretation
the renewal term, as was provided for in the original lease, would call
for 10 years for the first ten years, and a renewal for the next
three years and 10 years for the next three years. We said that
the clause is sufficiently definite, both as to the term and the
renewal. It is admitted that the defendant gave his authority fully

While we hold against the legal points made by plaintiff, we are not content to permit this judgment to stand, but are of the opinion there should be another trial for the reason that the trial court improperly excluded evidence touching the circumstances of the insertion of the option clause in defendant's copy of the lease. The addition of the option clause changed the legal effect of the defendant's copy of the lease from the copy in plaintiff's possession. The burden was thereby cast upon defendant, claiming the benefit of the inserted option clause, to explain how this came to be inserted in his copy and not in the other. The circumstances are such as have been characterized in the decision as "suspicious circumstances," and the addition should be explained satisfactorily and for this purpose all evidence tending to throw light upon the circumstances should be admitted. Landt v. McCullough, 206 Ill. 214; Hogan v. Arnold, 233 Ill. 19.

A witness, William W. Murray, undertook to explain how this insertion was made. Testifying on behalf of defendant twelve years after the occurrence, he says he was working in defendant's music store and that in the early part of 1917 Pearson brought in two copies of a lease for defendant to sign. Murray gives the conversation in detail, - that defendant said the option was not there and that Pearson then said he would write it in; that Pearson sat down at an old typewriter belonging to defendant in the store and wrote it in one copy and that both parties then signed the leases and defendant gave Pearson some money; that Pearson then said he would bring back a couple of new leases and "you can keep this one" (defendant's copy) "in the meantime;" that there were present at this time Pearson, a Mr. Humball, defendant and the witness. Pearson and Humball had both died sometime prior to the trial.

The question naturally arises, why did not Pearson, who was a lawyer, also insert the option clause in the copy of the lease kept by him? This could have been done in a few minutes, and that

he did not do so is so contrary to the usual order of things as to cast suspicion on Murray's testimony. Defendant was properly not permitted to testify as to this occurrence, under para. 4, ch. 51, Illinois Statutes.

Defendant was permitted to testify as to conversations he had with Mr. Braese, representing plaintiff, which took place in the fall of 1926 and the spring of 1927, relating to the occupancy of the premises after the pending lease had expired. Braese testified as to these conversations, saying in substance that he had many talks with defendant with regard to the occupancy of the premises in question after April 30, 1917; that he had informed defendant that he must move at that time as a tenant of an adjoining store who was expanding his business desired the store then occupied by defendant; that defendant protested, giving reasons why he did not wish to move; that there were subsequent negotiations with reference to defendant taking another store; that in none of these conversations did defendant claim to have an option to renew his present lease or make any statement with regard to same, and that the first time Braese knew or had any notice that defendant claimed an option for renewal was when the formal written notice was served upon him. Upon motion of defendant's attorney all of this testimony was stricken out. This was error. Plaintiff was entitled to have his witness give his version of the conversations and furthermore it was admissible as tending to throw light on the integrity of Murray's story as to the addition of the option clause. Furthermore, Braese testified that the books of account of Dunlap & Company from February to June, 1917, had been examined as to defendant's account and that this account did not show the payment of the \$75 referred to in the option clause. Upon motion this testimony was stricken. Upon the next trial plaintiff should produce his books to verify this testimony.

he did not do so in no conformity to the usual order of things as to
most situations on Murray's testimony. He did not do so in conformity to
the usual order of things as to most situations on Murray's testimony.

Witness was advised to testify as to what he saw and heard.
He had with Mr. Jones, representing himself, with some other
in the fall of 1932 and the spring of 1933, during the same
period of the year after the witness had been arrested. Jones
testified as to these conversations, saying in substance that he was
many days with witness and Jones in the company of the group.
and in particular after April 22, 1933; that he had informed witness
that he was now at that time in a room at the Hotel and that he was
was expecting his business partner who was then working by himself
and that business partner, giving testimony as to what he saw and
saw; that there were several conversations with witness in the
room and that witness was very much interested in the conversation.
His statement also to have an opinion as to what his partner was
and his statement with regard to that, and that the first time
Jones knew of that was when he was talking with witness in the
room and when the witness spoke and Jones was there.
Upon being asked whether he believed all of this testimony was
correct and, this was correct. He said yes. This was correct.
Witness gave his version of the conversation and testimony as to
whether he was talking to Jones in the company of the group.
that as to the addition to the group of Jones, he was
testified that the Jones was present at the time of the testimony
in June, 1933, and that Jones was at the time of the testimony
and that Jones was not there for a part of the time testified to in the
other cases. When asked what evidence was presented upon the
case that witness should present his name as being a party to
testimony.

The court also improperly sustained an objection to testimony by Brasse as to conversations with defendant after May 1, 1927. Any and all evidence bearing upon the facts should have been admitted, especially in view of the death of Pearson, the other party to the alleged occurrence in February, 1917. Standard Brewery v. Healy, 209 Ill. App. 272.

The option clause is also questionable in that it recites the payment in February, 1917, of the rental for May, 1927, the first month of the alleged renewal period, which payment was over ten years before defendant served notice that he wished to avail himself of the option and long before the parties knew whether the option to renew would be exercised.

In furtherance of justice there should be another trial and for the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett and O'Connor, JJ., concur.

The court also suggested certain questions to be
submitted by counsel as to the testimony of the witness
1937. Any and all evidence bearing upon the facts should have been
submitted, especially in view of the fact that the other party
is the alleged defendant in the case, and the court is
satisfied that the court is the court.

The court also is the court. The court is the court.
also the payment in February, 1937, of the money for the
first month of the alleged contract period, which payment was over
the same date but which was not in fact so paid.
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and the fact that the action was brought for the purpose of the action.

Witness

Witness

Witness

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DELLE E. ADAMS,
Appellee,

vs.

EUGENE VON HERMANN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF IOWA COUNTY.

257 I.A. 634

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant as guarantor of the performance by certain lessees of the covenants of a lease, and upon trial by the court upon stipulated facts had a finding and judgment for \$5753.61. Defendant appeals.

April 22, 1920, plaintiff made a written lease of certain premises in Chicago to Bell and Peters for a term commencing May 1, 1920, and ending April 30, 1930, at a rental of \$475 a month. February 1, 1921, with the consent of plaintiff, the lessees assigned their interest to Stewart A. McKie, who in turn assigned to Eric W. Olson and Anton von Hermann, with the consent of plaintiff. Subsequently, October 30, 1923, with the consent of plaintiff, Olson and von Hermann assigned to Edward Glasser and Fred Weiss. The consent of plaintiff was in consideration of the written guaranty of Eugene von Hermann, the defendant, for the performance by Glasser and Weiss of all the covenants, agreements and conditions contained in the lease. Glasser and Weiss took possession, but prior to June 1, 1924, as shown by the stipulation, "wrongfully and without fault, knowledge or consent of plaintiff wholly vacated and abandoned the premises in question." Default was made in the payment of rent June 1, 1924, and continuously thereafter. After abandonment of the premises plaintiff used due diligence to re-rent the same. At the time of the abandonment the premises were in bad order and repair. December 22, 1924, plaintiff, with the knowledge and consent of Glasser and Weiss and defendant, re-rented the premises to one Oscar Fisher who went into possession on or

about January 1, 1978, and is still in possession. There were other facts stipulated which we do not think it necessary to narrate, but it is stipulated that the only contention of defendant was that the re-renting of the premises to Fisher operated, as a matter of law, as a surrender of the lease and extinguished the liability of defendant as guarantor, and that if the court should so hold then defendant admits a liability to plaintiff of \$1033.38 and no more; but if the court should find against defendant's contention, then it was stipulated that plaintiff should be entitled to recover \$5753.61 and costs. The court held against defendant's contention and entered judgment accordingly.

Did the re-entry and re-renting of the premises after default and abandonment of the premises and default in payment of the rent operate, as a matter of law, as a surrender of the lease so as to relieve the defendant as guarantor? The rule is that a surrender can only be effected by agreement between the landlord and the tenant, either express or implied. There can be no surrender by the act of the tenant alone. Johnson v. Northern Trust Co., 265 Ill. 263; Braker v. The National Union Bldg. Assn., 146 Ill. 221. Counsel for defendant does not contend that there was any mutual agreement to surrender, but argues that the acts of plaintiff evidence her intention to surrender the lease and all rights thereunder. We find no evidence in the record supporting this claim. The written guaranty called for notice to defendant of defaults by Glosser and Feies. It was stipulated that plaintiff complied with all the terms and conditions of the guaranty and that she gave defendant due notice of all the terms and conditions of the lease to Fisher. These acts, together with the bringing of this suit before the term of the original lease had expired, are wholly inconsistent with the contention that plaintiff intended to surrender the original lease and relieve the guarantor. Many cases have held that upon abandonment of leased premises by a tenant without the landlord's fault or consent, the landlord may re-enter and re-rent the premises

about January 1, 1982, and is still in possession. There were other
facts stipulated which we do not find it necessary to recite, but
it is stipulated that the only contention of defendant was that the
posting of the premises as a place of business, as a matter of law, was
not sufficient to establish the liability of defendant to the plaintiff.
Defendant, and that if the court should so hold then there was a
liability to plaintiff of \$2500.00 and no more; but if the court
should find against defendant's contention, then it was stipulated that
plaintiff should be entitled to recover \$2500.00 and costs. The court
held against defendant's contention and entered judgment accordingly.
Did the recital and recital of the facts after
defendant and abandonment of the premises and failure to pay for the
rent thereon, as a matter of law, as a matter of law, as a matter of law,
justify the defendant as defendant. The fact is that a contract was
only be affected by agreement between the landlord and the tenant,
which appears to imply. There was no contract between the two as to
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and there was no contract that there was any contract between the two parties,
but there was the fact of the contract between the two parties as to
tenant the issue and all rights in the contract. The fact is that the contract
was made by the two parties. The contract was made by the two parties.
to defendant at defendant by defendant and plaintiff. It was stipulated that
plaintiff complied with all the terms and conditions of the contract
and that the defendant has failed to pay for the use of the premises and
of the premises as a business. There was, together with the failure of the
plaintiff to pay the sum of the original lease and costs, the fact is that
compliance with the contract that plaintiff intended to comply with the
original lease and to pay the defendant. There was no contract between
the defendant of the premises by a contract with the plaintiff's
land of the premises, the defendant and plaintiff and plaintiff.

and credit the lessee with the proceeds, and so doing does not relieve the tenant from liability for the stipulated rent. Harrison, Assting & Co. v. Wheeler, 176 Ill. 514; Marshall v. The John Broome Clothing Co., 154 Ill. 421; Levy v. Burkstrom, 191 Ill. App. 478; Contreras v. Star Brewing Co., 145 Ill. App. 507; Am. v. Baker, 110 Ill. App. 130.

The lease specifically provided that, in case of default and abandonment by the lessees the plaintiff might re-enter and re-rent the premises for any period and upon any terms she might see fit, and that her doing so should not operate as a cancellation of the lease or a release of the lessees from performance of their covenants and that performance and payment by any substituted tenant should constitute pro tanto satisfaction only of the obligations of the lessees thereunder. The parties were clearly competent to make such an agreement and there was no reason why such an agreement should not be enforced. Heine Brewing Co. v. Flannery, 137 Ill. 309; LaSalle v. Hamilton Nat. Bank, 204 Ill. App. 518.

Defendant argues that because the re-letting was for a term longer than the original lease the lessees were thereby discharged. The lease specifically provided that the re-letting might be for such a term as the plaintiff might see fit to make.

It is next contended that the original lease was abrogated because the plaintiff permitted or required alterations to be made by the new tenant. The original lease provided that the landlord is given the right of access to the premises to make such repairs or alterations as lessor may see fit to make. It appears that the premises were originally let for use as a garage and were received by the lessees in good order and repair and they agreed to maintain them in conformity with all state laws and city ordinances. It was stipulated that, when the premises were abandoned they were in bad order and repair and could not be used as a garage because not conforming to the laws and ordinances. The lease provided that in such case the landlord might enter

and credit the books with the proceeds, and so forth, and the
the same law relating to the proceeds, and so forth, and the
E. C. v. Whelan, 185 Ill. 412; E. C. v. Whelan, 185 Ill. 412;
E. C. v. Whelan, 185 Ill. 412; E. C. v. Whelan, 185 Ill. 412;
E. C. v. Whelan, 185 Ill. 412; E. C. v. Whelan, 185 Ill. 412;
E. C. v. Whelan, 185 Ill. 412; E. C. v. Whelan, 185 Ill. 412;

The issue specifically provided was, in case of default
and abandonment by the borrower was plaintiff might recover not only
the amount for any period not upon any other day than the day of the
that has been so shown and operate as a termination of the loan or
a release of the borrower from payment of the loan and that
testimony and appears by my testimony that the plaintiff
the issue specifically provided by the defendant to the plaintiff
was, the parties were in fact admitted to the fact of payment
and that the plaintiff was not in payment and was not in payment
E. C. v. Whelan, 185 Ill. 412; E. C. v. Whelan, 185 Ill. 412;
E. C. v. Whelan, 185 Ill. 412; E. C. v. Whelan, 185 Ill. 412;

Defendant argues that because plaintiff was not a
party to the contract between the plaintiff and the defendant
the issue specifically provided that the plaintiff might not recover
from the defendant might not recover.

It is well established that the plaintiff was not a
party to the contract between the plaintiff and the defendant
and that the plaintiff was not a party to the contract between
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between the plaintiff and the defendant. The plaintiff was not a
party to the contract between the plaintiff and the defendant.

The issue provided that in case of a default and abandonment

and repair the same "without such entering causing or constituting a termination of this lease." It was stipulated that the repairs were necessary. Such a provision in a lease has been sustained in Lynette v. Hamilton National Bank, 304 Ill. App. 512; Marke v. Cortside, 16 Ill. App. 177; Valber v. Malkewicz, 191 Ill. App. 108; Marshall v. Crouse, 134 Ill. 421.

Defendant also argues that by giving Fisher, the new tenant, an option to purchase the premises and requiring him to pay his rent in cash, taxes and insurance premiums, plaintiff had exercised such complete dominion over the property that the original lease was thereby surrendered. We cannot agree to this, for the lease expressly conferred upon plaintiff the right to re-let the premises on any terms she might see fit.

We have noted the citations of decided cases in defendant's brief and agree, for the most part, with the principles of law therein stated; but such propositions are either not applicable or fail to sustain defendant's contention that there was, in law, a surrender of the premises.

We hold that the finding of the trial Judge was proper and the judgment is affirmed.

AFFIRMED.

Ketchett and O'Connor, JJ., concur.

[illegible]

the right one is.

It has been the object of the investigation to determine the extent of the damage to the property of the Government and the extent of the damage to the property of the private citizens. The investigation has been conducted in a thorough and impartial manner and the results are set forth in the report.

[illegible]

W. H. BINSON & CO., a Corporation,
Appellant,

vs.

HELVOOD PARK STATE BANK, a corporation,
Appellee.

APPEAL FROM CIRCUIT
COURT COOK COUNTY.

257 I.A. 634³

MR. PRESIDING JUSTICE MCGURRY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in assumpsit claiming \$2084.10 from defendant. Upon trial by the court the finding was adverse to plaintiff and from the judgment that it take nothing it appeals.

Plaintiff's claim was based upon the alleged loss of various items of money through the dishonesty of its secretary, J. E. Omand. Defendant asserts (1) that plaintiff did not prove that it suffered any loss; and (2) that the loss, if any, was occasioned by the negligence of plaintiff in failing to examine the monthly statements of its account rendered by defendant.

W. H. Binson & Co., a copartnership consisting of W. H. Binson and Louis W. Frank, has been in the plumbing contracting business for some time and had an account with the defendant bank. On July 23, 1926, this partnership became a corporation but the bank account was continued in the same manner and in the same name as before. There is some slight dispute as to whether defendant was notified of the change from a partnership to a corporation, but we do not think this fact is decisive. John E. Omand was one of the incorporators of the company and was a stockholder and director and was secretary of the company. He kept the books, made collections from customers, both checks and currency, made all deposits in the bank and got the monthly bank statements and receipted for them. L. W. Frank was the president and treasurer of the company and testified that he virtually owned all the stock; that Binson never owned any stock and was not connected with the corporation. The only card the defendant

had authorizing signatures to checks was dated December, 1925, and signed by Frank and Elmsen. Frank testified that Elmsen had entire charge of the books from November 13, 1926, to July 2, 1927; that he himself had nothing to do with them and did not examine them; that Elmsen had endorsed checks for deposit and checked the bank statements; that he trusted all the bookkeeping and banking to Elmsen, as he, Frank, seldom went to the bank, since his part of the business was estimating, taking care of the men and the outside work.

Elmsen left about July 2, 1927, and Frank testified that he had not heard from him since. Frank also testified that after Elmsen left he looked at the check stub book and thought "there wasn't enough money in the bank;" that an auditor had been in about a month before to audit the payroll for an insurance company and told Frank that the books seemed to be in bad shape; that afterwards plaintiff had an auditor examine the books. The auditor did not testify but Frank stated that the auditor told him "he could not find out much from the books." Frank also said he did not know how long the books had been in bad shape. In answer to an inquiry as to how they were able to tell from the books as to what amounts should have been deposited, the attorney for plaintiff said: "We have the ledger sheets here and if you can make head or tail out of them, you are welcome to them. The auditor only found a few cases here and there." This evidence, of course, does not prove that plaintiff suffered losses.

It is argued that the examination of the deposit slips made by Elmsen indicates losses. These deposit slips are in Elmsen's handwriting. A typical slip shows \$135.35, apparently the amount of a check deposited, although this is uncertain; then underneath this is the figure 6 and at the bottom of the slip opposite the total the figures \$129.35, indicating that \$6 had been deducted. The amount credited to plaintiff's account by defendant

was \$129.35. On the following day another slip would indicate a deposit of \$100 currency and on the following day another deposit in currency. A later deposit, apparently checks, indicates a deduction in cash of \$89. Plaintiff argues that it suffered a loss of the aggregate of such deductions.

It may be a reasonable inference that Omand received these cash deductions, but it does not follow that plaintiff suffered a loss thereby. Omand had entire charge of the bookkeeping and banking of plaintiff and so far as appears to the contrary he may have used the money for the company and not appropriated it for his own use. Omand made collections for plaintiff both in currency and in checks and deposited the same. If he wished to deduct from the deposits for his own use, he would hardly indicate the amount of such deductions in his own handwriting upon the deposit slips. He could have pilfered directly from the currency. However this may be, there is a total absence of evidence that plaintiff suffered loss of the amounts of these deductions; and in the confused state of its books we do not see how it is possible for this fact to be determined. To rest any judgment against defendant upon such proof would be solely upon the presumption that Omand was an incompetent bookkeeper and dishonest. The indications point that way, but this is not legal proof on which to predicate a judgment for any certain amount.

Defendant rendered monthly bank statements showing the amount of deposits and checks for a period from November, 1926, until the following July. These monthly statements contain the usual printed notations, namely, that the depositor has received the cancelled vouchers and agrees "to examine same carefully and if not correct to give notice and make reclamation within ten days." These were signed by Omand. At other places upon the statements were printed words asking the depositor to examine the statement at once and "if no error is reported in ten days, account will

be considered correct." Also at the bottom of the right hand column of the statement was printed: "the last amount in this column is your balance." Frank testified that he never examined these statements but left this entirely to Omand.

We hold that this is a case for the application of the general rule, to which there are exceptions, that plaintiff was negligent in failing to examine the monthly statements with the vouchers returned and that it cannot hold the defendant responsible for any losses occasioned by peculations of its secretary.

Plaintiff relies on Merchants' Nat'l Bank v. Nichols & Shepard Co., 223 Ill. 41, which involved the case of an agent, resident in Illinois, acting for his principal in Michigan. The agent, in effect, borrowed money from the Illinois bank without authority from his principal. The decision holds that the claim of the bank, on account of the depositor's negligence in failing to examine his monthly accounts, is defeated by its own contributory negligence in not ascertaining the authority of the agent to borrow money and, further, that there was no reason to suppose that the statements of account of the Illinois office would be sent to the principal office in Michigan for examination.

There is also a line of cases where a bank has paid checks on signatures clearly forged where it has been held that the bank is not relieved from liability for forged checks which had been paid, by the failure of the depositor subsequently to discover the forgeries. Such is the holding in the old case of Fairer's Admrs. v. Denison, 10 N. Y. 68, cited by plaintiff; but in Morgan v. U. S. Mtg. & Trust Co., 208 N. Y. 218, this decision was in effect overruled.

There are a large number of decisions supporting the rule we are applying to the instant case; among these are Leather Mfrs.' Bank v. Morgan, 117 U. S. 26; California Vegetable Union

v. Crocker National Bank, 37 Cal. App. 743; Hammerschlag Mfg. Co. v. Importers & Traders National Bank, 252 Fed. 266; Pena v. National Bank of the Republic, 132 Mass. 186; England Nat'l Bank v. U. S., 222 Fed. 121. In Calvin Coal Co. v. First National Bank, 286 S. W. 901, it was held that it was clearly the duty of the plaintiff "to have the bank account checked within a reasonable time and to determine and report any irregularities. It delegated this duty to Jenkins and it is bound by Jenkins' acts, even though he may have acted in his own interest or even fraudulently." In Coburn v. Corn Exchange Nat'l Bank, 318 Ill. App. 23, and in Kaszab v. Grossenbaum & Sons M. & T. Co., 253 Ill. App. 107, the general rule was stated, citing a number of supporting cases. It is sufficient to say that the great weight of authority supports the conclusion that on the state of facts before us plaintiff, in failing within a reasonable time to examine the monthly statements and vouchers, contributed to the losses, if any, and hence it cannot recover from defendant.

The finding of the trial court was proper and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

1. The first of these is the fact that the evidence is not sufficient to establish the guilt of the accused.

2. The second is the fact that the evidence is not sufficient to establish the guilt of the accused.

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ARVILLA LIVINGSTON,
Defendant in Error,

vs.

UNIVERSITY CAB CO., INC.,
A Corporation,
Plaintiff in Error.

507
CASE TO CIRCUIT COURT
OF COOK COUNTY.

2571A.634^u

MR. PRESIDING JUSTICE McCORMY
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$3750 entered against it upon the verdict of a jury in the trial of a personal injury suit. There is no dispute as to the occurrence. The only controversy concerns the extent of the injuries.

On the evening of June 3, 1927, plaintiff was riding in the front seat of an automobile with a Mr. Levy; three other friends were riding in the rear seat. They were going north on Sheridan road. When they reached Juneway terrace, a cross street, they were stopped by the red light signal. While standing there and the red light still on, defendant's taxicab going north came up behind them and ran into them with sufficient force to send their automobile into an automobile six feet ahead, breaking the front lamp, bending the front bumper and damaging the rear of the car and the right wheel. The collision threw the people seated in the back seat into those in front and plaintiff was thrown against the windshield and back into the seat, receiving injuries.

The controverted question is whether the serious physical condition of plaintiff which followed the accident was caused thereby or was the result of tubercular spinal trouble from which she had suffered many years before. When plaintiff was eight years old she had a long spell of typhoid fever which left her in a weakened condition, from which a tubercular spinal trouble developed and for a while she wore a body cast.

1094

• **Wavelength:** 410-470 nm
• **Excitation:** 410 nm

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DATE 08-11-2010
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UNIVERSITY COLLEGE, OXFORD, ENGLAND
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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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10. Do you have any other comments? None.

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... The following are the names of the persons who have been ...

1. The first step is to identify the problem or goal. This involves understanding the current situation, identifying the key issues, and determining the desired outcome.

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It would be well advised never to negotiate last year's work.

Source: *Blackboard*. The *Blackboard* system is based on the *Blackboard* architecture.

By the time she was ten years old this trouble had healed up but left her with a curved spine. From this age until she was thirty-six she was strong and worked at various employments, waiting on table, in a drug store and in a department store. She married in 1931 and had been living with her husband for six years before the accident, during which time she was in good health, did her own housework and kept roomers part of the time.

The immediate result of the accident was an injury to her left knee and a bruising of her back and right side, causing marks and much pain. She was taken to the hospital the night of the accident and treated by the family physician until the following August. The suffering from her back and side continued and grew worse. There appeared a swelling in her back at the dorsal and lumbar region. Physicians were consulted. By the first part of August the swelling had grown large and it was diagnosed as a tubercular abscess by a surgeon who operated on both sides of her spine, drained out a pint of pus and inserted a drainage tube. She lost much weight and was in bed most of the time for four months. This physician diagnosed her trouble as a tubercular abscess caused by the injury received in the accident breaking down the walled-off and cured tubercular condition of the spine and causing it to light up and become active again. A surgeon who took X-rays gave his opinion that the accident caused the tubercular condition to become active and explained to the jury from the X-rays certain definite things which showed that the tubercular trouble was active and attacking the vertebrae and that this active condition was of recent origin.

The evidence showed that she was compelled to give up her housework and her roomers and had doctors' bills to pay and had to employ maids to do her housework.

Against this was the evidence of two doctors who gave it as their opinion that she was suffering from the pleural cavity

being filled with fluid. They testified they aspirated her for this, but the plaintiff denies that they aspirated her. On the other hand, the doctor who treated plaintiff testified that there was no trouble with her pleural cavity and that this would not affect the lumbar vertebrae which the X-rays show was in process of deterioration. Defendant also had the evidence of a janitor of the building where plaintiff resided, who testified that in the spring of 1927 she was sickly. Also an investigator for defendant testified that he called at plaintiff's house two or three days after the accident and that she told him she suffered only a little bruise on her knee.

The jury could properly believe from this somewhat variant testimony that the injury plaintiff received in the accident broke down the walled-off protection by which nature had cured the old tubercular condition of plaintiff's spine nearly twenty-five years before the accident, and that the injury received caused this old tubercular condition to again become active. There was much technical and medical evidence on both sides, but we cannot say that the amount of the verdict returned by the jury is manifestly unjustified by the evidence.

The verdict for plaintiff was returned on March 2, 1929, and on March 16th, in connection with a motion for new trial and to support defendant's claim of newly discovered evidence, it presented two affidavits, one by Rose Ban, dated February 14, 1929, and another of the same date made by Margaret Becker; also an affidavit of Harold Schlensky, dated March 15, 1929. The affidavit of Rose Ban was merely to the effect that plaintiff lived in her rooming house during August and September, 1928, and was apparently in good health. This evidence as to her apparent condition over a year after the accident and after she had been operated on in August, 1927, would not tend to contradict the evidence of the

operations or that the accident necessitated them. Margaret Becker's affidavit was to the effect that she lived with plaintiff from March to June, 1928, and that plaintiff had told her of having suffered from a tubercular spine in her youth. This affidavit also charges plaintiff with being a prostitute in March, April and May, 1928. Even if true, this was not relevant to anything connected with the accident. There is some basis for the criticism by plaintiff's attorney that this affidavit is a scurrilous attack by a person of evidently low character against a plaintiff who is living with her husband and apparently enjoying a good reputation. The affidavit of Schlensky, who is the duly authorized agent and investigator for defendant is to the effect that for four months immediately prior to the date of the trial he attempted to locate plaintiff but was unable to do so. This affidavit is of no importance and does not show due diligence. We adopt as applicable to the present situation the language of the Supreme Court in The People v. Williams, 242 Ill. 197:

"Applications for a new trial on the ground of newly discovered evidence, in order to justify its allowance, should fulfill the following requirements: (1) the evidence must appear to be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; and (5) it must not be merely cumulative to the evidence offered on the trial. Strictly speaking, the evidence offered does not come within the class of newly discovered evidence."

And again:

"In order to prevent, so far as possible, fraud and imposition which defeated parties may be tempted to practice as a last resort to escape the consequence of an adverse verdict, applications for new trial on account of newly discovered evidence should always be subjected to the closest scrutiny by the court. The rules of law which govern such cases, if carefully observed, will generally accomplish justice."

We are of opinion the trial Judge properly overruled the motion for a new trial.

There is nothing in the record justifying a reversal and the judgment is affirmed.

AFFIRMED.

Hatchett and O'Connor, JJ., concur.

[illegible]

9781-017-640-204-1, available at: www.wiley.com

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a message of condolence to the people of the State of California, who have been suffering from a severe drought. The President expresses his sympathy for the people and offers them his best wishes for a successful season.

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For information in Atlanta.
There is nothing in the record regarding a removal and
a new trial.

33734

W. M. WATSON & CO.,
a corporation,

Appellee,

v.

ANDREW LINO and JOHN B. McDERMID,
doing business as Lino-McDermid Co.,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

257 I.A. 635

MR. PRESIDING JUSTICE McDERMID
DELIVERED THE OPINION OF THE COURT.

Defendant by this appeal seeks the reversal of a judgment for \$649.64 entered upon trial by the court in a suit in which plaintiff alleged an account stated on account of business transactions between the parties.

The defendant in this court has presented a great deal of argument with quotations from decided cases, but reduced to its simplest elements the defense is that no account stated was proven.

An account stated is an agreement between persons, having had business transactions, with a promise of payment, either express or implied. The bookkeeper for plaintiff testified that on October 11, 1928, he presented a statement of the account between the parties with a request that defendant pay the balance shown on the statement to be due. The statement, which is in evidence, shows that plaintiff is a grower and dealer of head lettuce at 67 South Water market; that the defendant is in business next door at 65 South Water market. The statement shows items of merchandise delivered over a period of approximately nine months with credits, showing a balance due of \$638.66. The witness also testified that he also subsequently demanded payment of defendant but that nothing had been paid on the account. Defendant introduced no evidence.

We hold that the evidence of plaintiff proved the essentials to an account stated and that the amount of the judgment which included interest, which defendant does not seem to question, was proper.

Plaintiff asks that the statutory damages of ten per cent be imposed in this court on the ground that the appeal is apparently taken for delay. We are inclined to agree with this contention, especially in view of the fact that there is not the slightest attempt to defend the merits of plaintiff's claim, and therefore additional statutory damages in the amount of \$50 will be imposed and judgment for the same will be entered in this court.

AFFIRMED WITH STATUTORY DAMAGES.

Matchett and O'Connor, JJ., concur.

In this case the evidence is entirely in favor of the
 defendant as he cannot be held liable for the actions of his
 which included interest, which included both the way in which
 was made.

It is also true that the defendant was not the one who
 by reason of this case on the ground that the agent is not
 liable for his acts. It is not the agent who is liable for his
 actions in this case of the fact that he is not the agent
 although in some cases the agent of a principal is liable for his
 actions. The defendant is not liable for the actions of his agent
 and defendant for the same will be held to be liable.

THE COURT OF COMMONS

London, 11th January, 1881.

34035

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

vs.

JAMES T. BREVINGTON,
Plaintiff in Error.

WRIT OF HABEAS CORPUS
OF CHICAGO.

257 I.A. 635²

MR. PRESIDING JUSTICE MCGUIRE
DELIVERED THE OPINION OF THE COURT.

Information was filed charging defendant with obtaining money by false pretenses. Upon trial by the court he was found guilty and sentenced to imprisonment for a term of thirty days in the House of Correction and fined \$5 and costs. By this writ of error defendant seeks a reversal, alleging only the insufficiency of the information.

The information made by Lucy Parker charged that defendant on August 14, 1929, at the City of Chicago, did

"Unlawfully, wilfully and fraudulently by false pretenses, to-wit: pretend to obtain the release of one Foster Day from the House of Correction, did obtain from the said Lucy Parker the sum of Five Dollars lawful money of the United States of America and the property of the said Lucy Foster, the said James T. Brevington then and there well knowing at the time he obtained said Five Dollars from the said Lucy Foster that he was not going to obtain release of said Foster Day from the House of Correction and that he was then and there obtaining money by false pretenses in violation of Section 253 of Chapter 38 Smith R.S. 1927."

The information does not charge that the false pretenses were made "with intent to cheat and defraud." As was held in People v. Cohen, 147 Ill. App. 396, this was an essential element to constitute the crime under the statute and that:

"There could be no lawful conviction under the information, which was fatally defective in failing to aver that the representations were made 'with intent to cheat and defraud.' The statute makes such averment necessary, and lacking it, no crime known to the law was stated as violated by defendant."

The reasoning in the Cohen case was, in substance, followed in People v. O'Brien, 251 Ill. App. 314. In People v.

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OF THE BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE

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U. S. DEPARTMENT OF JUSTICE

Information was also received from the
Federal Bureau of Investigation, New York, that
was being held and maintained in the files of
the Bureau of Investigation and that it was
by this that a copy of the same was obtained.
The investigation of the information.

The investigation was by the Bureau of Investigation
on August 14, 1937, at the City of New York.

Initially, it was not known that the
subject was in the City of New York, and
the Bureau of Investigation, New York, was
the one of the Bureau of Investigation of the
Department and the property of the City of New York.
James T. Thompson was then and there was
he obtained with the Bureau of Investigation
he was not going to obtain the same of the
the Bureau of Investigation and that it was
being made by the Bureau of Investigation
of the Bureau of Investigation, New York.

The information was not known that the
same was made "in the City of New York" and
held in the City of New York, New York, and
it was to be made in the City of New York.

There was no information that the
same was being held in the City of New York
investigation was made "in the City of New York".
investigation was made "in the City of New York".

The investigation in the City of New York, New York,
followed in the City of New York, New York.

Id., 261 Ill. 197, it was held that the omission from the information of the word "knowingly" which was used in the statute was a fatal defect, as the word "knowingly" is part of the definition of the offense. This was followed in People v. Halpala, 234 Ill. 444.

The defendant also argues that the information is insufficient in that it alleges a false pretense as to something to be done in the future, namely, obtain the release of Foster Day from the House of Correction and that this was not a false representation of a present or existing fact. While the information is awkwardly drawn, yet we hold there is no merit in this criticism. The information charges that the defendant "pretended to obtain." The pretense was then an existing fact.

It is said the information does not allege that the complaining witness relied upon the representations so made. The information charges that by means of the false pretenses defendant obtained the money from Lucy Parker. As was said in People v. Weber, 152 Ill. App. 102, this allegation implies the idea that the complaining witness relied upon the representations made and, if she had not done so, defendant could not by means of such representations have induced her to part with her property. For the above reasons we hold that the information was insufficient.

We know of no reason why informations may not be amended. It has been held that they, unlike indictments, may be amended. Giroux v. People, 137 Ill. App. 508; Sorgekrasser v. People, 134 Ill. App. 609; Weisel v. Kalns, 203 Ill. App. 257. At common law informations could be amended. Fruitt v. People, 88 Ill. 318; Long v. People, 135 Ill. 435. And this has not been changed by the Statute of Amendments and Joinders, chap. 7, secs. 9 and 11. In People v. Fensky, 397 Ill. 440, it was held that by section 11 aforesaid, the Legislature expressed the purpose to confine the subject matter of the act to civil cases and to leave the law as to criminal cases unchanged.

The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

Witchett and O'Connor, JJ., concur.

34053

DELLA SPRATT,
Appellee,

vs.

FISCHER PARAMOUNT THEATRES, Inc.,
a Corporation,
Appellant.

537
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

257 T.A. 635³

MR. PRESIDING JUSTICE McSURNELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff upon trial of a suit in assumpsit had a verdict for \$2313. Defendant appeals from the judgment entered.

Plaintiff alleged that she paid defendant said sum (1) under duress, and (2) that defendant had and received money from her which in equity and good conscience it ought not to retain, but should return to her. There is much evidence in the record which we will not detail. We hold that the jury was justified in finding that the evidence supported plaintiff's allegations.

In 1927 the Indiana Advertising Syndicate, managed by H. F. Sweatland, was in business in co-operation with movie theatres in Wisconsin operating a scheme for promoting the sale of admission tickets by offering prizes, aggregating approximately \$2,000, to persons who would make the most sales of books of coupon admission tickets. Sweatland interested plaintiff in this business. She was a widow, living in Chicago, with little or no business experience. She agreed with Sweatland to furnish the cash to pay the prizes, which money was to be paid back to her when the returns came in and she was to receive as her compensation a certain percentage of the returns. She says she knew nothing about how the advertising syndicate carried on its business. The first advertising campaign in which she was interested was at Fond du Lac, Wisconsin; then followed one at Madison and another at Portage, which seemed to have been carried on simultaneously.

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November 21, 1937, the day of the occurrences in question, Sweatland and plaintiff were at Portage. The campaign at Madison was in charge of a Mr. Binker, a subordinate of Sweatland's. Mr. McWilliams, defendant's general manager and fiscal agent at Madison, testified that he was told by two of the prize winners at Madison that they had not received the full amount of their prize money. These prize winners were not produced at the trial. Thereupon McWilliams, Len Brown, manager of one of the Madison theatres, a Mr. Norman, another manager for defendant, and two lawyers, all representing the defendant, drove in the evening to Portage, as one of them said, "with the impression that these people were crooks, that they were engaged in crooked business and, if possible, we were going to get from them the money we claimed was due to the Fischer Paramount theatres." They first approached Sweatland to obtain some money from him but without success. They then sent a Mr. Bradley, the manager of the Portage theatre, to get plaintiff, who was in a downstairs office of the theatre, and when she was brought upstairs she was confronted by all of these six men. Brown said to her, "Well, Mrs. Spratt, the jig is up. We found out you are all just a bunch of crooks." Then followed, as she says, repeated charges against her, made in a boisterous manner, using profane language, that she was associated with a bunch of crooks who had done a lot of confidence work in Madison. They told her that Binker, Sweatland's man, had defrauded some of the contestants at Madison and that they were there to get the money from plaintiff and take it back to the winners. She protested ignorance of the whole business but they told her she must pay and that they had to have that money there by nine o'clock the next morning or they would put them all in jail; they told her that the Wisconsin laws were very severe and that the syndicate was running a confidence game. She told them she had no money with her, but had a

diamond ring, which they demanded as security. She became ill and asked permission to go to the ladies' retiring room. They sent one of their men, Bradley, with her and told him not to let her get out of his sight. Plaintiff was sick while in the ladies' room and vomited. Bradley waited for her outside and helped her back up the stairs, remarking that he did not blame her, "with a bunch of hounds like that." Plaintiff became so ill and confused that she could not remember the name of the place where her money was kept in Chicago. They sent her over to her hotel to get her papers with one of the lawyers, Grelle, who stood outside her hotel door while she searched her papers for the address. On the way back she protested to Grelle about the injustice of making her pay for some one else, and was told by him that she was a partner and therefore liable. Upon her return to the theatre she was presented with a judgment note for \$2367.45, payable at ten o'clock the next day, which she signed as demanded. She also, under pressure, signed a letter and telegram to Lloyd D. Jones, who had charge of her money in Chicago, urging him to wire her \$2500 before noon of the following day. A so-called "compromise agreement" was also prepared and her signature demanded. She signed all the papers without reading them upon the assurance of one of the lawyers present that it was all right. She says she signed everything that they put before her without regard to the contents; that she was nearly "scared to death" and that when she was walking downstairs with Mr. Bradley she became so weak she could hardly walk. She kept protesting that she had nothing to do with the distribution of the prizes at Madison; that Hinker was the manager at that place for Sweetland. This interview lasted from approximately seven o'clock until nearly ten p. m. After she had signed all the papers they took her diamond ring as security and she was again sent back to the hotel under the guard of Mr. Borman. Again she protested to Borman that it was a great injustice to ask her to pay this money for which she "had

almost two miles long, surrounded on two sides by the
 school building to go to the ladies' retiring room. They went out
 on their own, usually, with her and left him to get out and
 on his night. He usually was also while in the ladies' room and
 vomited. Bradley walked her out outside and helped her back to the
 office, remarking that he did not know her. "With a bunch of women
 like that." He usually became an ill and continued until he could not
 remember the name of the place where her money was kept in Chicago.
 They went her over to her hotel to get her papers after one of her
 lawyers, Wells, was asked outside and helped her with her clothing
 her papers for the address. On her way back she presented to Wells
 about the indication of raising her pay for some time ago, and was told
 by him that she was a partner and shareholder in the firm. From her return
 to the theatre she was presented with a judgment note for \$100.00.
 payable at ten o'clock the next day, which was signed or countersigned.
 The note, under pressure, signed a letter and returned to Lloyd E.
 Jones, who had charge of her money in Chicago, telling her to give
 her \$1000 before noon of the following day. A receipted "promissory
 agreement" was also prepared and her signature furnished. The signed
 all the notes without reading them upon the condition of one of the
 lawyers present that it was all right. She says she signed every-
 thing that they put before her without regard for the substance. She
 says she usually "agreed to anything" and that when she was visiting home-
 stead with Mr. Bradley she became so weak that she could hardly walk.
 She kept protesting that she was not intended to go with the situation
 of the person at home; that Lloyd and the lawyers at that time
 for her money. This interview lasted from approximately seven o'clock
 until nearly ten p. m. After that time she said all the money that had
 her money was so weakly and she was again sent back to the hotel
 under the guard of Mr. Bennett. Again she protested to Bennett that it
 was a great injustice to her not to pay this money for which she had

worked all these years." Norman said it would be better for her to pay it; "If you didn't, they would put you in jail." Plaintiff saying that she had ^{not} done anything, Norman said: "It didn't make any difference. You are one of the partners. When you have the Wisconsin laws, you are just up against the real thing." Plaintiff replied, "I don't know what I am doing, but I am willing to do anything that is right."

The following morning plaintiff was still ill and at about ten o'clock Norman called her up at the hotel, asking if the money had come. When told that it had not come, he called Lloyd Jones in Chicago on the telephone and told him that plaintiff was in trouble and it was very important that the money be gotten there by a certain time. Plaintiff also called a Mr. Arthur L. Jones in Chicago and urged him to have the money sent there. When he protested, she replied, "I don't know what it is, but I want to get out of it."

The money came about four o'clock and one of the defendant's representatives went down to the telegraph office with her and from there to the bank, where the check was cashed and \$2312.45 was given to Norman and the judgment note and the ring were returned to plaintiff. She testified that at the time the note and ring were given she owed the defendant nothing and previous to that time had had no dealings with it; "I wouldn't have known any of them."

Arthur L. Jones testified that he was present at Madison the night of the closing of the contest and saw the prizes awarded and the contestants receipt for the prizes. When McWilliams was asked on cross-examination whether he gave plaintiff an opportunity to investigate the facts as to the alleged fraud, he replied that he did not "because it was not necessary."

The evidence is convincing that defendant's representatives by threats to send plaintiff to jail extorted from her the money in question. The spectacle of six men, two of them lawyers, threatening

I don't know where I am looking, but I am looking at the same thing as you are. You are looking at the same thing as I am.

[illegible][illegible]

1. The Commission is not necessary.

The witness is convinced that defendant's statement is true.

and frightening one woman, ignorant of business transactions and ill, into delivering money to them, is, to say the least, unpleasant. The jury was fully justified in finding that the money was paid under duress. Ross v. Schmitz, 184 Ill. App. 250, with a long list of citations.

We are also of the opinion that plaintiff was entitled to recover under her count for money had and received by defendant to which it was not entitled. Peterson v. O'Neill, 258 Ill. App. 400.

The evidence fails to prove that there was, in fact, any fraud with reference to the Madison theatre contest. As we have noted, Arthur L. Jones testified that he saw the prizes paid and receipts given for the same. The only thing touching irregularity at Madison is the statement of McWilliams that he was told by Betty Hansen, a twelve year old girl, and by Mrs. McFringe, that they had not received all of their prize money. McWilliams did not have the addresses of these persons and did not know where they were.

The record does not show any right of the defendants to collect this prize money even from the advertising syndicate. If any one was defrauded, it was the prize winners, and not the defendant. On direct examination McWilliams said that when they went to Portage and saw Sweatland they explained to him that the money for the prizes had been advanced to the contestants by the theatre, and further testified to the effect that they had paid \$2,000 to "disgruntled contestants." When asked if he had receipts to show for the same, he said he thought they were in the Chicago office. Subsequently, Len Brown, manager of the Madison theatre, was questioned in regard to this statement of McWilliams' and answered that the theatre had never paid that money, to his knowledge. The court thereupon demanded that the receipts from the contestants be produced at a later session of the trial. Subsequently McWilliams was recalled and admitted that the theatre had not advanced a single dollar for prizes at the time he demanded the money from Sweatland and from plaintiff. No receipts were produced.

Under such circumstances the jury could properly conclude that the defendant had no right to collect any money from plaintiff and that she was entitled to recover what she had paid.

The case turns largely upon a question of fact and all the circumstances, including such we have not narrated here, lead clearly to the conclusion that the money was paid to the defendant under duress, and that defendant received money from plaintiff which in equity and good conscience it was not entitled to receive and which she was entitled to recover.

Errors are claimed and argued at length with reference to the rulings of the trial court upon the instructions. We find that no serious error in this regard was committed, and as the judgment was proper it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Under such circumstances the jury could properly
state that the defendant had no right to collect any money from
plaintiff and that she was entitled to recover what she had paid.
The case turns largely upon a question of fact and not
the circumstances, involving much as have not materialized, and
clearly to the conclusion that the jury was paid in the defendant
plaintiff, and that defendant received money from plaintiff
which is exactly the fact established in the evidence in evidence
and which she was entitled to recover.

There is no claim that the defendant was entitled to recover
the balance of the full amount upon the installment. It is
that no portion upon in this regard was collected, and as the
defendant was never in the position,

RECEIVED

RECEIVED BY DEFENDANT, JULY 11, 1911

34094

SARGANON PAPER GRADING COMPANY,
Appellee.

vs.

EVENING AMERICAN PUBLISHING COMPANY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

257 I.A. 035'

MR. PRESIDING JUSTICE MCGURDY
DELIVERED THE OPINION OF THE COURT.

Defendant by this appeal seeks the reversal of an adverse judgment of \$600 entered upon the finding of the court in the trial of an action wherein plaintiff sought to recover compensation for damages to its automobile truck following a collision with defendant's truck.

Did the evidence justify the finding that defendant's negligence caused the accident?

Plaintiff's employee, Zook, on an October afternoon was driving its truck loaded with baled waste paper weighing four or five tons, north on Morgan street approaching Milwaukee avenue, which runs northwesterly in Chicago. The neighborhood is well built up and the afternoon traffic is rather heavy. Zook says he was going about five or six miles an hour as he neared Milwaukee avenue and that he saw defendant's truck about sixty or seventy feet away, approaching from the northwest on Milwaukee avenue; that he thought defendant was coming "at too great a speed," so he stopped his truck to let defendant go by. He estimated defendant's speed at thirty miles an hour. Zook stopped when his truck was about half way on Milwaukee avenue and before he reached the street car tracks on Milwaukee avenue. The front wheels of defendant's truck passed by plaintiff's truck but its rear right wheel struck the left front chassis of plaintiff's truck, damaging it.

There is no substantial difference in the testimony of the respective drivers except as to the speed of defendant's truck, its driver saying he was going eighteen miles an hour.

EXHIBIT 1000-1000-1000

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EXHIBIT 1000-1000-1000

This truck had no load. The driver testified he was driving in the street car tracks on Milwaukee avenue and as he passed plaintiff's truck he heard a bump and immediately stopped and saw that plaintiff's chassis was cracked. The rear wheels of defendant's truck stuck out from the sides more than the front wheels, which tends to explain why the front wheels passed plaintiff's truck safely but the rear wheels struck it. Defendant's driver attempted to explain the accident by saying that he "figured" that plaintiff "let the truck roll down," and defendant presents some argument that this indicates that there was an incline in the street towards the street car tracks. There was no evidence of any such incline and plaintiff's driver testified that, after he stopped to permit defendant's truck to pass he did not move.

The court was justified in concluding that defendant's driver in driving at a fast rate of speed and in making no attempt to turn to the left so that his rear wheels would avoid striking plaintiff's truck, was guilty of negligence, causing the collision. At least we cannot say that the finding of the court was manifestly against the weight of the evidence.

We cannot agree that the amount of damages allowed is excessive, as it was well within the scope of the testimony.

The judgment is affirmed.

AFFIRMED.

Matchett and C'Connor, JJ., concur.

This truck had no load. The driver testified he was driving in the
west end of the city on Highway 100 and at the corner of Highway 100
and 10th Street he saw a pickup truck and immediately stopped and saw that
LITV's license was expired. The rear window of the pickup truck was
broken and from that time until the time the truck stopped, which time
he testified was about 10-15 seconds, he testified that he saw the driver
of the truck, who was driving at the time, and he testified that he saw
the accident by seeing that the "light" was yellow. The driver
told him, "and defendant's pickup truck was stopped at the
intersection and there was no vehicle in the street beyond the
intersection. There was no evidence of any other vehicle
approaching the intersection from the north, after he stopped to permit
LITV's truck to pass he did not move.

The court was satisfied in concluding that LITV's
driver was driving at a fast rate of speed and in failing to stop
he was in the left of the road and was moving rapidly
LITV's truck, was going at a fast rate of speed, and was moving
in the left of the road and was moving rapidly
LITV's truck, was going at a fast rate of speed, and was moving
in the left of the road and was moving rapidly.

The court also found that the driver of LITV's truck
was driving at a fast rate of speed and in failing to stop
he was in the left of the road and was moving rapidly
LITV's truck, was going at a fast rate of speed, and was moving
in the left of the road and was moving rapidly.

EXHIBIT

Exhibit 1 and 2, pages 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

33735

DANIEL L. MADDEN and EDWARD J. KELLEY,

Appellants,

vs.

SARAH L. JOHNSON,

Appellee.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

257 1A, 635⁵

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Daniel L. Madden and Edward J. Kelley, attorneys and solicitors, filed a bill in equity to enforce an alleged contract for contingent fees and to obtain a lien upon certain real estate which was the subject matter of the litigation in which they performed services for defendant, Sarah Johnson.

She answered the bill denying its equity and filed a cross-bill praying that a certain contract in writing executed between the parties on August 17, 1926, should be set aside because, as alleged, it was entered into while the relationship of client and attorney existed between the parties.

Complainants answered the cross-bill, the cause was put at issue, the evidence heard by the chancellor, and a decree entered in favor of cross-complainant but directing her to pay complainants the sum of \$2,500 which the decree found to be the reasonable compensation for the services of complainants. That decree complainants seek to reverse by this appeal.

The law applicable is well settled and is stated in Elmore v. Johnson, 143 Ill. 513. This case has been consistently followed, and both parties cite and rely upon it. It is there said:

"Before the attorney undertakes the business of the client he may contract with reference to his services, because no confidential relation then exists and the parties deal with each other at arm's length. The same is true in regard to dealings which take place after the relation has been dissolved. (1 Story's Eq. Jur.--13 ed.--secs. 310 to 313.) But the law watches with unusual jealousy over all transactions between the parties, which occur while the relation exists.

"Whatever may be the rule as to a purchase by an attorney from a client, we think that, where the title to property is so

THE UNITED STATES OF AMERICA

IN SENATE

COMMITTEE ON THE JUDICIARY

HEARINGS

ON THE NOMINATION OF

JOHN EDGAR HOOVER TO BE ATTORNEY GENERAL

JOHN EDGAR HOOVER, Attorney General, was called to the stand.

Q. Now, I will ask you to state to the committee the substance of the report of the grand jury in the case of the

for conspiracy to defraud the United States, and to state the names of the persons who were named in the indictment.

A. The grand jury returned an indictment against the following persons:

JOHN EDGAR HOOVER, Attorney General, and the following persons:

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JOHN EDGAR HOOVER, Attorney General, and the following persons:

involved in litigation that the value of the property depends upon the decision as to such title, a contract made during the pendency of the litigation to compensate the attorney for his legal services with a part of the property involved therein, should be held to be voidable at the election of the client, irrespective of the fairness or unfairness of the contract, provided such election is exercised within a reasonable time. Such a rule as this is demanded by public policy and in the interests of a wholesome administration of justice."

These rules of law are well settled in this jurisdiction and we are disposed to apply them to the fullest extent.

The material facts established by the evidence seem to be that cross-complainant, Sarah Johnson, in April, 1921, was the owner of a tract of land of about 4.33 acres situated in Cook county, Illinois. On July 5, 1921, by warranty deed she conveyed to one Fred P. Bernard 2.82 acres of said tract for a consideration of \$5,200. Part of the purchase price was paid in cash, and she took notes secured by a mortgage of the land conveyed for the remainder.

In April, 1922, Miss Johnson called at the office of Madden, as Madden testifies, in company with her brother or a Mr. Ellison, but, as Miss Johnson testifies, alone. She complained that Mr. Zander, a real estate operator, who represented her in the sale to Bernard, had so divided the land as to deprive her of the more valuable frontage. She stated that she desired to have this conveyance set aside. She was told to get the necessary papers and return. A few days later she came back bringing the papers and Madden undertook to investigate the matter at the recorder's office and elsewhere. When she again returned he told her that he did not think she could have the transaction set aside on the theory of fraud concerning the frontage but stated that she might possibly be able to succeed upon the theory that Zander while acting as Miss Johnson's broker procured a transfer of the land for his own benefit to Bernard, an employee in his own office. On May 18, 1922, Bernard by deed conveyed the real estate to Zander.

Madden testifies that at that time they discussed the question of fees and that cross-complainant told him she was willing to pay expenses but that he would have to perform his services upon a contingent fee. He says he told her that if he would pay \$650 for costs and expenses he would take the case on a contingent fee of 25% in case of settlement or 1/3 if the case went to trial. Madden then took Miss Johnson to the room of an associate, Mr. Cunningham, and told him to take a complete statement. Madden said he would take Cunningham in with him and would get the best legal talent he could.

Cunningham testifies that he talked with Miss Johnson about the case and with reference to the terms of their employment. He says:

"She wanted us to take it on a straight contingent fee. I said, 'We can't undertake this case on a straight contingent fee. There is too much work, too much uncertainty involved in it, too much expense.' I said, 'If you will pay something down on account of expenses and retainer, and make a reasonable arrangement as to the balance, we would take it.' So we came to the agreement, that she would pay \$650 down and twenty-five per cent of the value of the property if we got a settlement before trial. I told her that we would try to settle the case again, and, in the event the case should go to trial, it would be one-third. I told her she would go to trial. There would be no chance to settle this case, and I said, 'This case will go to the Supreme court, I feel sure. There will be a lot of work.' I said, 'I will draw up the contract embodying this agreement and we will sign it and go ahead with the case.' So I did draw up a contract about that time, and I think I gave her the contract and she said, 'I will take and have it looked over by my brother or somebody.' I said, 'That is perfectly all right; you can take that contract to anybody you like and let them see it, examine it, and bring it in again.'"

While the testimony of Cunningham is indefinite as to the time at which this conversation occurred, it is apparent from other testimony that it was prior to the filing of the bill to set aside the transfer of the real estate theretofore conveyed by Miss Johnson to Bernard, namely, June 27, 1922. Cunningham says: "So she took the contract with her and later on we went on with the case and I draw the bill and the bill was filed." The contents of the bill, which is in evidence, also indicates that this conversation

was prior to the filing of the sums, since it is alleged therein that the tender had theretofore been made to Zander and others.

On May 19, 1922, cross-complainant paid \$150 to Madden and he gave her a receipt "to apply on attorney fee." The bill against Zander and others was filed by Madden and Cunningham June 27, 1922, and on August 15, 1922, Miss Johnson paid to Madden a further sum of \$500 for which he gave another receipt again to apply on attorneys' fees.

Miss Johnson testifies that at the first interview with Madden at his office a friend named Ellison was present. He was not produced as a witness and his absence is not accounted for. Her memory as to what occurred on that day is quite faulty. She says:

"I don't just recall all of it. We talked about the case." He said it was an expensive thing, and he said it was nothing sure whether we win or not, to that effect."

She thinks Mr. Ellison said something about taking it on "whether we lost or won," but Madden didn't want to take it that way and that nothing else was said at that time about fees "that I can recall." She says that on May 19, 1922, when she paid the \$150, "nothing else was said about fees or more money at that time," and "nothing was said further about the suit at that time," that she could recall. She says that afterwards Ellison came out and told her that a payment of \$500 more was wanted; that Cunningham was not present at that time but that Madden made out the receipt and gave it to her; she further says: "Nothing that I can call to mind was said about fees and his compensation at that time. He said nothing at that time about a contract for fees."

Miss Johnson, however, testifies to a conversation with Cunningham which she places at a later date in which he stated the terms of employment substantially as related by

that the human and environmental data were in conflict and showed

of U.S. King David Jones-Scott, 1901, at age 70

*. 1971. 1972. 1973. 1974. 1975. 1976. 1977. 1978. 1979. 1980. 1981. 1982. 1983. 1984. 1985. 1986. 1987. 1988. 1989. 1990. 1991. 1992. 1993. 1994. 1995. 1996. 1997. 1998. 1999. 2000. 2001. 2002. 2003. 2004. 2005. 2006. 2007. 2008. 2009. 2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 2220. 2221. 2222. 2223. 2224. 2225. 2226. 2227. 2228. 2229. 2230. 2231. 2232. 2233. 2234. 2235. 2236. 2237. 2238. 2239. 2240. 2241. 2242. 2243. 2244. 2245. 2246. 2247. 2248. 2249. 2250. 2251. 2252. 2253. 2254. 2255. 2256. 2257. 2258. 2259. 2260. 2261. 2262. 2263. 2264. 2265. 2266. 2267. 2268. 2269. 2270. 2271. 2272. 2273. 2274. 2275. 2276. 2277. 2278. 2279. 2280. 2281. 2282. 2283. 2284. 2285. 2286. 2287. 2288. 2289. 2290. 2291. 2292. 2293. 2294. 2295. 2296. 2297. 2298. 2299. 2300. 2301. 2302. 2303. 2304. 2305. 2306. 2307. 2308. 2309. 2310. 2311. 2312. 2313. 2314. 2315. 2316. 2317. 2318. 2319. 2320. 2321. 2322. 2323. 2324. 2325. 2326. 2327. 2328. 2329. 2330. 2331. 2332. 2333. 2334. 2335. 2336. 2337. 2338. 2339. 2340. 2341. 2342. 2343. 2344. 2345. 2346. 2347. 2348. 2349. 2350. 2351. 2352. 2353. 2354. 2355. 2356. 2357. 2358. 2359. 2360. 2361. 2362. 2363. 2364. 2365. 2366. 2367. 2368. 2369. 2370. 2371. 2372. 2373. 2374. 2375. 2376. 2377. 2378. 2379. 2380. 2381. 2382. 2383. 2384. 2385. 2386. 2387. 2388. 2389. 2390. 2391. 2392. 2393. 2394. 2395. 2396. 2397. 2398. 2399. 2400. 2401. 2402. 2403. 2404. 2405. 2406. 2407. 2408. 2409. 2410. 2411. 2412. 2413. 2414. 2415. 2416. 2417. 2418. 2419. 2420. 2421. 2422. 2423. 2424. 2425. 2426. 2427. 2428. 2429. 2430. 2431. 2432. 2433. 2434. 2435. 2436. 2437. 2438. 2439. 2440. 2441. 2442. 2443. 2444. 2445. 2446. 2447. 2448. 2449. 2450. 2451. 2452. 2453. 2454. 2455. 2456. 2457. 2458. 2459. 2460. 2461. 2462. 2463. 2464. 2465. 2466. 2467. 2468. 2469. 2470. 2471. 2472. 2473. 2474. 2475. 2476. 2477. 2478. 2479. 2480. 2481. 2482. 2483. 2484. 2485. 2486. 2487. 2488. 2489. 2490. 2491. 2492. 2493. 2494. 2495. 2496. 2497. 2498. 2499. 2500. 2501. 2502. 2503. 2504. 2505. 2506. 2507. 2508. 2509. 2510. 2511. 2512. 2513. 2514. 2515. 2516. 2517. 2518. 2519. 2520. 2521. 2522. 2523. 2524. 2525. 2526. 2527. 2528. 2529. 2530. 2531. 2532. 2533. 2534. 2535. 2536. 2537. 2538. 2539. 2540. 2541. 2542. 2543. 2544. 2545. 2546. 2547. 2548. 2549. 2550. 2551. 2552. 2553. 2554. 2555. 2556. 2557. 2558. 2559. 2560. 2561. 2562. 2563. 2564. 2565. 2566. 2567. 2568. 2569. 2570. 2571. 2572. 2573. 2574. 2575. 2576. 2577. 2578. 2579. 2580. 2581. 2582. 2583. 2584. 2585. 2586. 2587. 2588. 2589. 2590. 2591. 2592. 2593. 2594. 2595. 2596. 2597. 2598. 2599. 2600. 2601. 2602. 2603. 2604. 2605. 2606. 2607. 2608. 2609. 2610. 2611. 2612. 2613. 2614. 2615. 2616. 2617. 2618. 2619. 2620. 2621. 2622. 2623. 2624. 2625. 2626. 2627. 2628. 2629. 2630. 2631. 2632. 2633. 2634. 2635. 2636. 2637. 2638. 2639. 2640. 2641. 2642. 2643. 2644. 2645. 2646. 2647. 2648. 2649. 2650. 2651. 2652.

The bill against murder and robbery was filed by Hansen and Smith
in January 1937, and on August 10, 1938, it was amended to add
the section on kidnapping.

When I saw the picture of the man, I was surprised to find that he was the same man who had been with me in the hospital.

...with reference to the ...
...the ...
...the ...

63743

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

[illegible]

10-10-68

1. The first of these is the fact that the "new" and "old" are not always clearly defined. The "new" may refer to a new style, a new color, or a new material, while the "old" may refer to a traditional style, color, or material. This can lead to confusion and misunderstanding.

1. The first of these is the fact that the

THE NATIONAL BUREAU OF INVESTIGATION

that I can tell you about them and the organization.

1947

1945-1946, 1947-1948, 1949-1950, 1951-1952, 1953-1954, 1955-1956, 1957-1958, 1959-1960, 1961-1962, 1963-1964, 1965-1966, 1967-1968, 1969-1970, 1971-1972, 1973-1974, 1975-1976, 1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 26

... model of such things as the ... and other ...

1907. *Journal of the American Medical Association*, Chicago, August 15, 1907, p. 1000.

Hadden and Cunningham and substantially as set forth in a writing prepared by Cunningham which he says he handed to her but which she says she received by mail. The letter from him to her which accompanied this writing was not produced. Miss Johnson categorically denies the statements of Hadden and Cunningham, but she testifies to substantially the same arrangement with reference to fees with the exception that she places the time of the conversation after the bill was filed, which was of course after the relationship of attorney and client had been established.

Her brother, John L. Johnson, who lived in a home adjoining her property, testifies that he first met Mr. Hadden at the latter's office in 1923; that he then introduced himself, had a conversation about the matter of the litigation which he, Hadden, was handling for Johnson's sister. What was said at that time does not appear in the record, the attorney for cross-complainant stating, "I don't care about this conversation." John L. Johnson, however, further testifies that in 1925 he had a conversation with Hadden with reference to the case and asked him if he was charging Sarah any more money than he had already got, to which Hadden replied, "No, I am not."

At any rate Cunningham went to Florida and the writing which he had drawn as expressing the oral agreement theretofore made between the parties was returned by her and remained in his files unsigned. Before he left for Florida a demurrer to the bill had been argued. The trial of the case was delayed until June, 1926, when it came on for hearing.

At the request of Hadden about that time, Mr. Kelley, the other complainant, came to Hadden's office. Kelley testifies that he met Miss Johnson there; that she asked him what the chances of winning the case were, to which he replied that one could never

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See footnote 1, Table 1, column 1, for details.

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[illegible]

tell; that in her presence Madden said, "Unless we win there won't be any money paid to you. The fee is contingent. We have a written contract;" that Miss Johnson didn't say anything to that but that she did say, "You can't get any fees unless you win. You are to get one-third if you win." Kelley said that he asked her what the property was worth; that she shrugged her shoulders; that he said, "I'd like to have some idea as to what the fees are going to be;" that Miss Johnson replied, "No fees unless you win." He says he told her that he didn't know anything about the property, that he had never seen it; that she said, "It is understood that you don't get any fees unless you win;" that he said, "That is satisfactory to me. I will try the case;" that he asked to see the written contract, which was produced; that he asked why she had not signed it, and that she said, "Well, I showed it to somebody;" that he couldn't remember whom; that some friend, he thought, had told her that as she had paid all costs and expenses, \$650, the \$3,200 ought to come whole to her.

He says that he then interlined the matter she had suggested with reference to the \$3,200, wrote it into the contract in her presence and had the contract rewritten; that she took it away to show to somebody and later signed it.

Mr. Kelley also testifies that the value of the property was discussed in the presence of Miss Johnson and her brother, and it was then stated the property was worth much more than \$3,200.

While Miss Johnson again makes categorical denials of the conversations as testified to by Mr. Kelley, a consideration of the whole evidence leaves no doubt that prior to his employment Madden and Miss Johnson agreed upon the fees for the services to be performed; in substance, that if the case was settled the fees should be 25% of the value of the property recovered, but if the case went to trial the attorney should receive one-third of the

fell; that in her presence Johnson said, "I believe in the power of
the money that is in your hands. The law is on your side. It is a right

for me to say, "You can't get any more money from me. You are
to get one-third of your share." He said that to me and to the others.

The property was sold; that the money was divided; that he
said, "I'll like to have some idea as to what the law is. It is
to be; that Miss Johnson replied, "We have asked you this." He says

he said that he didn't know anything about the money, that
he had never seen it; that he said, "It is understood that you
don't get any more money from me." That he said, "That is what

he said to me. I will try to see." That he said to me and
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value of the property recovered, less \$3,200, and that this should be in full payment of their services. While the written contract was in fact signed after the relation of attorney and client had been established, it only expressed in substance the oral agreement made before the establishment of such relation and before Madden and his associates entered upon their employment. There is absolutely no doubt upon the record that the agreement was for a contingent fee aside from the \$650 which was paid and which it was apparent would in all probability be required for expenses. It seems highly improbable that Miss Johnson, who, it was apparent, was acting under the advice of friends, would employ attorneys in a case of this character without having some understanding as to their fees, and it also seems highly improbable that Madden, knowing that the fee was to be contingent, would enter upon the employment without an understanding as to the amount of the fee which he would receive.

We have made a careful examination of the testimony of cross-complainant and it fails to convince us of frankness or reliability. Her original answer under oath avers that she employed Madden and Cunningham for the sum of \$650, and she denies that she represented to Kelley and to Madden that the fees in the case were to be contingent, but these averments are disproved by her own testimony. She admits that she signed the written contract on August 17, 1926, and avers under oath that she did this under fear and duress. There is not a scintilla of evidence in the record to indicate actual duress, and the finding of the decree is to the effect that the contract is void at her option because the relationship of attorney and client existed between the parties at the time it was made. In her original amended answer she avers that the property involved is of the value of \$150,000. In her amended answer, which is also under oath, she places its value at \$15,000.

In her amended answer she denies under oath that "she ever at any time" entered into a verbal or written contract with complainants but that contract is established without a doubt by her own testimony. The record shows without contradiction that the agreement between the parties was for a contingent fee, and we think the clear and manifest preponderance of the evidence is to the effect that the agreement as to all material matters was entered into prior to the time that the relationship of attorney and client was established.

The record shows without contradiction that when cross-complainant visited the office of Madden in April, 1922, she did not have in mind the facts which would make it possible for her to recover in her case; that those facts were ascertained through the investigations of Madden and his associates; (the deed from Bernard to Zander was made May 13, 1922, several weeks after her first visit to Madden's office); that they performed the preliminary work and prepared and filed the bill against Zander and others on June 27, 1922; that they thereafter prosecuted the case with diligence; that after Cunningham went to Florida Mr. Kelley was called in to assist in the case with the consent of Miss Johnson; that on July 15, 1926, after a trial of the case, a decree in her favor was entered; that the defendants in that case appealed to the Supreme court and that the Decree of the trial court was there affirmed on December 23, 1926. Johnson v. Bernard, 323 Ill. 527.

Without discussing the matter at length, it cannot be doubted upon this record that cross-complainant received extended and valuable legal services from cross-defendants and that those services were performed under an agreement contingent in its nature, under which they were to receive nothing unless they were successful. It is also clear that this agreement was made before Madden agreed to take the case and before the relationship

of attorney and client was brought into existence. The property involved has increased in value since this contingent contract was made. That fact discloses the real cause for this controversy. There is nothing in the record to indicate that the agreement was unfair or unconscionable.

Even if we were compelled to hold under the strict legal rule that the written contract of August 17, 1936, was voidable at the option of cross-complainant, it would by no means follow that cross-defendants are entitled only to a reasonable fee for actual services performed, since the setting aside of the written contract would bring into full force and effect the oral contract which was substantively the same as the written one. The rule of law which makes voidable a contract between attorney and client entered into while the relationship exists is salutary and necessary. It is not applicable to facts such as appear in this record, and its application under the facts which here appear would have the effect of perpetrating a grave injustice against solicitors who have faithfully performed services for their client and acted honorably with her in every particular.

We may add, without discussing the matter at length, that in our opinion the \$2500 allowed by the court was inadequate compensation for the actual services performed.

The case of cross-complainant against Ender and others was practically created through the services rendered by her solicitors. They performed these services upon the contingency that their labors would be without compensation unless they succeeded in getting back the property which cross-complainant conveyed to Barnard. It is apparent that if the market value of the real estate had decreased instead of increased this controversy would never have arisen.

Cross-defendants are entitled to receive as compensation for their services, in conformity with the agreement between the

[illegible]

parties, one-third of the real estate recovered or the equivalent of its value in money, less \$5,000. What that amount is cannot be satisfactorily determined from this record. For that reason the decree is reversed and the cause remanded with directions for further proceedings in conformity with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

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33959

JENNIE E. ZECHMAN, Doing Business
as ZECHMAN & CO.,
Plaintiff in Error,

vs.

ISADORE OSSEY et al.,
Defendants in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

257 I.A. 636

MR. JUSTICE HATCHERY DELIVERED THE OPINION OF THE COURT.

Complainant in the trial court sued out this writ of error to reverse a decree entered in a proceeding in a court of chancery, whereby she sought to secure the foreclosure of an alleged mechanic's lien for the sum of \$824.19. The cause was heard by a chancellor upon exceptions filed to the report of a master. The master found the equities with complainant and recommended a decree in her favor for the full amount claimed. The decree sustained the exceptions and found the sum of \$332.95 was due but that complainant was not entitled to a lien therefor. Defendants tendered to complainant this sum found due, but complainant refused to accept it. The decree taxed 5/8ths of the cost against complainant and 3/8ths against defendants.

These findings and the taxation of costs are assigned as error.

The bill filed October 27, 1926, alleged that defendants were the owners of the premises described; that on June 22, 1926, they commenced an improvement of the same and on the same date made an oral contract with complainant to furnish lumber for the improvements; that the immediate delivery of the lumber thereafter as ordered was made, and that the reasonable value thereof was \$824.19. It alleged the failure of defendants to pay for the same and the filing of a notice for a mechanic's lien in the office of the clerk of the Circuit court on September 23, 1926.

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The amended answer of defendants admitted ownership of the premises, the making of the improvement which it was alleged was begun approximately a year prior to June, 1926, and an agreement to pay a reasonable price for the lumber and delivery of the same; but it alleged that the deliveries constituted an account beginning in 1925 and running through a part of 1926.

The answer denied that the last delivery was on September 1, 1926, or that the reasonable price of the lumber was as alleged or that the amount claimed was due; but averred that a bill for \$824.19 was presented in September, 1926; that defendants checked all the bills rendered for lumber delivered; that complainant did not deliver all the lumber set forth in the bills, and that the charges were beyond the reasonable market price; that defendants paid \$506.90 and were entitled to a credit of \$248.90, leaving an amount due complainant of \$196.08, which sum defendants tendered in payment.

The master found that an oral contract was made June 22, 1926; that delivery of the lumber was made thereunder, and that the last delivery was made September 1, 1926; that the lumber was used in making improvements, and that its reasonable value was \$824.19; that a mechanic's lien notice was filed September 26, 1926, in accordance with the statute.

The master further found that defendants claimed an overcharge on lumber purchased in 1925 and 1926 in prior transactions; that the evidence showed an account stated as to each transactions in March, 1926; that defendants claimed an overcharge was made by figuring the lumber by lineal feet instead of by square feet; that there is no merit in the contention; that the lumber furnished was of the kind and quality ordered, and that complainant was entitled to a lien.

Exceptions to the report of the master are general in

character, inviting an examiner of the record to launch forth upon a voyage of discovery without chart or compass. Malins v. Farrell. 33 Ill. App. 234. We have, however, undertaken to make the journey.

The record shows beyond a reasonable doubt full settlement by defendants for lumber furnished on prior occasions, the settlement having been made by check of defendant Isadore Ossey, dated March 15, 1936, made to the order of complainant, and there appears upon it in Isadore Ossey's handwriting, "Paid in Full." A further examination of the record discloses that the manifest preponderance of the evidence shows lumber was properly sold either on a board or lineal foot basis, and that the claim of defendants to an overcharge in this respect is without merit.

For the reasons indicated the decree will be reversed and the cause remanded with directions to overrule the exceptions to the master's report and to enter a decree in favor of complainant in conformity with the master's report.

REVERSED AND REMANDED
WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

34002

PULASKI LUMBER COMPANY,
a Corporation,

Appellee,

vs.

GUSTAV E. SEEGREN,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 I.A. 436²

MR. JUSTICE BATHOETT DELIVERED THE OPINION OF THE COURT.

On July 17, 1929, plaintiff caused a judgment to be confessed against defendant Seegren for the sum of \$5377.12, including \$332.90 allowed as attorney's fees. On motion of defendant supported by affidavit, the judgment was opened up. There was a trial on the merits by the court and a finding that on the date of the rendition of the judgment by confession there was due from plaintiff to defendant the sum of \$5377.13, and on October 3, 1929, judgment on the finding confirming the original judgment was entered, motions by defendant for a new trial and in arrest of judgment having been overruled.

It is urged that the court erred in its ruling on admission of evidence and that the judgment is excessive and erroneous.

Upon trial plaintiff offered in evidence the note of defendant described in the statement of claim. It was for the sum of \$7,000, dated at Chicago, March 8, 1926, to the order of plaintiff and due 90 days after date with interest at six per cent per annum. This note was received in evidence, and plaintiff rested.

Defendant then testified that Harry A. Gillman was president of the plaintiff corporation at the time the note was given. He was then asked to state the conversation with Gillman at that time with reference to the execution of the note and the time of payment. Plaintiff objected, and the objection was sustained

1947-1948, 1949-1950, 1951-1952, 1953-1954, 1955-1956, 1957-1958, 1959-1960, 1961-1962, 1963-1964, 1965-1966, 1967-1968, 1969-1970, 1971-1972, 1973-1974, 1975-1976, 1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 2689-2690, 26

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Defendant then offered to prove that Harry K. Gillman in a conversation with defendant regarding the time of payment of the note agreed with defendant at that time that the note in question was to be paid by a payment of \$2,000 in cash plus interest up to the date of payment to be made in 90 days after the date of the note, which was March 8, 1929; that a new note was to be executed by defendant, and that this note would be accepted by plaintiff in payment of the original note of \$7,000. An objection was sustained to that part of the offer referring to an agreement entered into.

Defendant then testified that on June 8, 1929, he called up Harry K. Gillman; that Gillman came to his office and defendant told him that on the 10th of the month he would give a check for \$2,000 plus interest and give a new note of \$5,000 in payment of the \$7,000 note; that defendant executed a new note for \$5,000 bearing date June 6, 1929, payable to the order of plaintiff, with interest at six per cent per annum after date, and that defendant turned this note and a check for \$2,000 and interest over to Harry K. Gillman, who was the brother of Leo Gillman, the present president of the plaintiff company. Defendant's check to the order of plaintiff for the sum of \$2,105 was produced and identified by defendant as the check he gave to Harry K. Gillman.

Defendant stated that on September 7, 1929, he dictated a letter and with that letter sent to plaintiff company a note for \$5,000 and a check for \$2,105 payable to plaintiff. The attorney for plaintiff admitted that this letter with its contents was received. The plaintiff company cashed the check.

Harry K. Gillman testified that on and prior to March 8, 1929, he was president of plaintiff company and that at the time the check was executed he made an agreement with defendant, but an objection by plaintiff to this testimony was sustained. He was then asked whether at the time the note was executed there was a conversation between him and defendant

"as to the manner and time in which this note should be paid," and what that conversation was, to which questions an objection was sustained by the court, as were objections to similar questions.

Defendant then offered to prove that at the time of the execution of the note sued on it was agreed by plaintiff and defendant that the note for \$7,000 should be paid at its maturity, which was 90 days after March 8th, by defendant by the payment of \$2,000 in cash with interest and by the execution by defendant of a new note of \$5,000 to be due 90 days after its date, and further that when said \$5,000 note became due it should be paid by defendant by making a further payment of \$2,000 and interest in cash and by the execution of a new note for \$3,000 to be payable 90 days thereafter. An objection of plaintiff to this offer was sustained by the court, as was an objection to a further question as to whether the conversation had been communicated to the new president of the company who succeeded the witness, Harry K. Gillman. This witness also testified that about June 10th or 12th defendant handed him a check for \$2,105 and a note in the amount of \$5,000, both payable to the plaintiff company.

Harry K. Gillman further said that defendant asked him whether he would be a messenger for him and take these papers to his brother; that the witness said he would and took them to his brother but he was not there at the time, so the witness handed them to the treasurer and asked him to give them to his brother, which the treasurer said he would do.

The \$5,000 note was offered in evidence, but an objection of plaintiff thereto was sustained.

On cross-examination Harry K. Gillman admitted a conversation with Lee Gillman, the president, about the note in question, and that the new president stated the arrangement was not satisfactory to him; that he was not going to consider it,

"as the number and line in which this matter is said," and
 that this conversation was, in all its details, as follows:
 continued by the court, as was explained in another direction.
 Defendant then stated to your Honor of the fact of
 the execution of the note and as it was given to Plaintiff and
 defendant that the note was for \$10,000, which was the amount of
 which the 30 days after March 31st, by defendant, by the amount of
 \$1,000 in cash with interest and by the execution of defendant of
 a new note of \$1,000, and as the 30 days after the date, and the
 then was said \$1,000 after March 31st is said to be paid by the
 Plaintiff by making a further payment of \$1,000 and interest in cash
 and by the execution of a new note for \$1,000 to be payable to
 the Plaintiff. An objection of Plaintiff to this was
 sustained by the court, as was an objection to a further question
 as to whether the conversation had been communicated to the man
 President of the company who executed the document, saying:
 Plaintiff. This witness also testified that when March 31st
 1938 defendant received his check for \$1,000 and a note in the
 amount of \$1,000, both payable to the Plaintiff company.
 That is all the witness said and that is all the witness
 has to say. He would be a competent to know and say that he
 is his brother; that the Plaintiff said he would not know him
 the brother but he did not know him; as the witness
 looked him in the presence and asked him to give him in his
 witness, which the Plaintiff said he would do.
 The witness was sitting in witness, and as the
 Plaintiff is Plaintiff Company was sustained.
 On cross-examination that is all the witness said
 conversation with the witness, the Plaintiff, that the man is
 Plaintiff, and that the man Plaintiff stated the conversation was
 that Plaintiff said that he was not going to answer it.

and that he was going to have Beagren pay up; that the witness said to Lee, "You are the president now *** and you can do just as you see fit***. Statically I think you ought to follow it out," and that Lee replied, "Well, I don't care about that, I want my money."

Defendant urges the proposition that an executed parol agreement is admissible in evidence, even though its effect is to vary or change the terms of a written contract, citing Snow v. Grisham, 220 Ill. 106, and other cases.

He further urges that under section 16 of the Negotiable Instruments law, as between the immediate parties, parol evidence is admissible to show that a note was delivered conditionally, citing Birness v. Citizens State Bank, 164 Ill. App. 420, affirmed in 254 Ill. 165; First National Bank v. Frell, 236 Ill. Ill. App. 412. These cases announce undoubted rules of law but are not applicable to facts such as here appear. The parol agreement which defendant undertook to prove was not executed, and the parol evidence offered did not purport to show that the delivery of the note originally was conditional.

There is no doubt of other propositions of law for which defendant contends, namely, that if a note sued upon has been in fact paid no recovery can be had upon it; that whether a new note constitutes a renewal of a former note depends upon the intention of the parties and that intention may be shown either by their agreement or by attendant facts and circumstances; that a note may be accepted as payment of an obligation evidenced by another note and that in such case the giving of a note will operate as payment. None of these propositions is here applicable for the obvious reason that plaintiff refused to accept the note offered as payment. It may be that as a matter of ethics plaintiff should have accepted the note and check according to the

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parol agreement made at the time of the execution of the note upon which plaintiff sues, but there is no competent proof in the record tending to show that such an agreement was made. The evidence offered was clearly an attempt to modify a written executory document and to vary its terms by parol evidence, and for that reason it was clearly inadmissible. The distinction between this case and cases where a parol agreement for a conditional delivery of the note was made has been pointed out by the courts, need not be repeated. Janus v. Harrington, 267 Ill. 37; Mandley v. Drug, 237 Ill. App. 567.

It is urged that the judgment is excessive and erroneous in that the attorney's fees allowed are too large, but defendant offered no evidence upon this issue. There is a clear distinction in this regard between cases where a judgment by confession is vacated and set aside, as in Geo. J. Cook v. Johnston,^{Co.} 179 Ill. App. 83, and those cases where, as here, the judgment is merely opened up with leave to plead. In this last class of cases a defendant is limited in presenting his defence to the merits and cannot be heard to urge mere technical matters. Fisher v. Wecker, 210 Ill. App. 345; West v. McLaughlin, 211 Ill. App. 259; Streeter v. Junker, 230 Ill. App. 366; Dazey v. Williams, 252 Ill. App. 329. If there was a mistake in the computation of the amount due upon the note or if the attorney's fees were excessive, the proper practice would have been for defendant to make a motion that the judgment be modified or corrected in the respects mentioned. Adam v. Arnold, 86 Ill. 135; Havana v. First National Bank, 162 Ill. 35.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS
on Relation of DR. CHARLES E. SCHARF,
Relator,

vs.

FRANK M. PADERN, Judge of the
Municipal Court of Chicago.

OFFICE OF THE MUNICIPAL COURT
OF CHICAGO.

257 1.1. 336³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The relator Scharf has filed in this court his petition against the respondent, one of the Judges of the Municipal court of Chicago, praying that a writ of mandamus issue directing said Judge to sign the bill of exceptions in a case tried before him.

The petition avers that a judgment was entered against Scharf in favor of Rudolph Fischman et al., on July 29, 1929; that on October 22, 1929, Scharf filed an amended petition and affidavit in support of a motion to set aside said judgment; that respondent heard the motion and entered an order denying the same, whereupon petitioner prayed an appeal to the Appellate court; that an order was entered requiring petitioner to file a bond within 30 days and a bill of exceptions within 60 days thereafter, and that the petitioner on December 5th presented a bill of exceptions showing the proceedings; that the court made suggestions and changes therein and continued the matter with instructions and directions that certain corrections be made; that on December 19th a true and complete record of the proceedings was presented but that the Judge refused to sign, certify and order the same to be filed. The petition avers that without such bill of exceptions he cannot protect his rights or properly present his cause to this court.

Respondent answered in substance that a bill of exceptions was presented, and that after being informed by the attorneys

for plaintiffs that they had not been served with a copy of the same and had no opportunity of examining it, the matter was continued in order to give the opportunity for such examination; that the said attorneys after examining the bill of exceptions called to the attention of respondent the fact that said bill of exceptions was improper for the reasons that neither defendant nor his attorney had a court reporter or a stenographer present to make a record of the proceedings which had taken place, and that the bill of exceptions as to the arguments and proceedings was not accurate and complete; that the copy of the affidavit in support of the motion to set aside the judgment in said bill of exceptions was materially different from the original affidavit filed with the clerk of the court and materially different from the carbon copy of the affidavit which had been served upon the attorneys for plaintiffs, "and that the said differences in the wording of said affidavit was not confined to a few words but existed in entire lines and sentences wherein new words and new lines and sentences had been put in place of the words, lines and sentences which had originally been typewritten in the said original affidavit as filed with the Clerk of the Municipal court;" that the copy of the amended petition and affidavit to set aside the judgment in the bill of exceptions appeared to be signed by Charles E. Scharf, and that respondent examined the carbon copy of the amended petition "which had been served upon said plaintiffs' attorneys in the court below" and upon such examination saw that it was in fact signed by W. J. Lewis, attorney for defendant, instead of by Scharf; that thereupon respondent refused to sign the bill of exceptions in the form it was then; that on December 19, 1939, the attorney Lewis made a motion to have respondent sign an amended bill of exceptions; that plaintiffs' attorneys again objected for substantially the same reasons as hereinbefore set forth, and for the further reason that the motion served upon plaintiffs' attorneys and also the original motion as filed with

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For plaintiff's first they had not been served with a copy of the same
and had no opportunity of examining it, the matter was continued in
order to give the opportunity for such examination; that the
attorneys after obtaining the bill of exchange as offered in the affidavit
of defendant the fact that bill of exchange was taken from
the records that neither defendant nor his attorney had a right to
return or a check-up was present to make a record of the proceedings
which had taken place, and that the bill of exchange as in the
arguments and proceedings was not complete and complete that the
copy of the affidavit in regard of the matter in and under the
judgment in said bill of exchange was materially different from the
original affidavit filed with the court at the time and originally
different from the other copy of the affidavit which had been placed
upon the attorney for plaintiff, and that the said difference in
the wording of said affidavit was not confined to a few words but
extended in entire lines and sentences and was not a few words
and sentences had been put in place of the words, lines and sentences
which had originally been typewritten in the said original affidavit
as filed with the Court at the material time; that the copy of the
revised version and affidavit in use under the judgment in the bill
of exchange was not as he signed by Thomas A. Nelson, and that
reponent furnished the other copy of the revised version "copy of the
bill of exchange upon said plaintiff's affidavit in the court below" and
upon such examination was that it was in fact signed by T. A. Nelson,
attorney for defendant, instead of by Nelson; that defendant's
and witness to sign the bill of exchange in the bill of exchange
that on December 12, 1920, the attorney for plaintiff had a copy of the
revised bill of exchange; that defendant's

attorney again objected for defendant's bill of exchange as being
false and false, and the further reason that the action being
upon plaintiff's affidavit was also the original version as filed with

the clerk of the Municipal court stated in a certain place therein, "Covenants of Defendant," but in the same motion in said amended bill of exceptions it stated, "Covenants of Plaintiffs;" further that a part only of the argument was included in the bill of exceptions and that nothing was said therein concerning the fact that defendant argued during the proceedings of the case that his defense for his client not paying rent was based upon constructive eviction, notwithstanding the fact that he admitted in the arguments before respondent which immediately followed that his client was then and yet in possession of the premises.

The petitioner filed a demurrer to this answer.

Without undertaking to review all the cases, it is the well settled law in this state that it is the duty of a trial judge to sign and seal a bill of exceptions in any case where the judgment entered by him is reviewable by an appellate tribunal. This duty will be enforced by mandamus, but this court will not usually direct a trial judge to sign a particular bill of exceptions. In settling a bill of exceptions a trial judge may resort to every legitimate means to ascertain the correctness of a bill which he is called upon to authenticate. He may use a stenographic report if such is available, or he may send for the witnesses and take such steps and measures as will legitimately and properly advise him of the truth and of the correctness of the bill of exceptions which he is requested to sign. These rules are stated in People ex rel. Eddie Hall v. Jesse Heldon, 193 Ill. 319, and the cases there cited.

It is further well settled law that an answer to a petition for a mandamus which is in general terms without alleging specifically the facts relied upon is not sufficient.

All the facts and circumstances should be set forth

the clerk of the Municipal Court stated in a certain House Report, "Government of Delaware," and in the same opinion in said House Report it is stated, "Government of Delaware," that not only of the arguments was included in the bill of exceptions and that nothing was said therein concerning the facts that defendant agreed during the proceedings at the time that his defense for his client had been read was based upon a statement which was made at the time that he admitted in the argument before the jury that his client was innocent and that he was not in possession of the gun.

The petition filed a demand for this money.

Without undertaking to review all the cases, it is the well settled law in this State that it is the duty of a trial judge to sign and send a bill of exceptions in any case where the judgment entered by him is reviewable by an appellate tribunal. This duty will be enforced by mandamus, and this court will not usually issue a writ (except to sign a particular bill of exceptions) in setting aside a bill of exceptions a trial judge may resort to every legal device known to maintain the correctness of a bill which he is called upon to authenticate. He may use a contemporaneous report if such is available, or he may send for the witnesses and take such other measures as will satisfactorily and properly explain him in the truth and of the correctness of the bill of exceptions which he is required to sign. These rules are stated in Wheeler v. Wheeler, 101 N. H. 100, 101, 102, 103, 104, and the cases there cited.

It is further well settled law that an answer to a petition for a mandamus which is in general terms without alleged facts, thereby the writs which are not warranted.

All the facts and circumstances should be set forth

with particularity in order that this court may determine the merits of the controversy. The answer does not conform to this rule and is not sufficient for that reason. The demurrer will therefore be sustained and the writ awarded.

We do not wish to be understood as directing respondent to approve this particular bill of exceptions, but it is his duty to examine it and to point out where the inaccuracies, if any, are and what, if any, corrections should be made, and when the bill sets forth a true record of the proceedings he should approve the same.

The writ of peremptory mandamus is awarded.

WRIT AWARDED.

McSurely, P. J., and O'Connor, J., concur.

THESE EXAMINATIONS IN ORDER THAT THIS COURT MAY DETERMINE THE TRUTH
OF THE MATTER. THE COURT HAS NOT YET MADE A FINAL DECISION IN THIS
CASE. THE COURT WILL CONSIDER THE MATTER IN THE
FUTURE AND THE WILL BE DECIDED.

IT IS NOT YET TO BE DETERMINED AS TO WHETHER THE COURT
SHOULD APPROVE THIS PETITIONER'S BILL OF COMPLAINT, BUT IT IS NOT YET
TO EXAMINE IT AND TO POINT OUT WHERE THE PETITIONER IS IN THE
WRONG, IF ANY, CORRECTIONS SHOULD BE MADE, AND THEN THE BILL
SHOULD BE RECONSIDERED IN ORDER TO REMOVE THE ERROR.
THE WILL OF THE COURT IS TO BE DETERMINED.

THE COURT WILL BE DECIDED.

THE COURT WILL BE DECIDED.

34047

PEOPLE OF THE STATE OF ILLINOIS
on Relation of Dr. Frank C. McG,
Relator,

vs.

FRANK E. PADDEN, Judge of the
Municipal Court of Chicago.

APPEAL FROM THE MUNICIPAL COURT
OF CHICAGO.

257 I.A. 636 ⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause comes before us upon the demurrer of the petitioner to the answer of respondent to a petition for mandamus.

The facts as disclosed by the pleadings are substantially similar to those which appear in People on Relation of Dehart v. Padden, General Number 34046, in which an opinion has been this day filed. For the reasons set forth in that opinion the peremptory writ of mandamus is granted.

WRIT AWARDED.

McSurely, P. J., and O'Connor, J., concur.

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This case was held in the hands of the
court for a long time and the court
has decided in favor of the plaintiff.
The facts as stated by the plaintiff are correct.

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34091

COSMOPOLITAN STATE BANK,
a Corporation,

Appellant,

vs.

LAKE SHORE TRUST & SAVINGS
BANK, a Corporation,

Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment in favor of defendant entered upon the finding of the court at the conclusion of plaintiff's evidence.

The suit by the plaintiff Bank was based upon a transaction in which the defendant Bank presented and collected through the Clearing House a check of A. Anderson for the sum of \$1762.50 made to the order of the Auburn Automobile Company on November 5, 1925.

There is practically no dispute as to the material facts. Anderson, who made the check, was at the time in question a depositor in plaintiff Bank. He made and delivered this check on the day of its date to one C. A. Benuster, who at that time was a depositor in defendant Bank. The check was deposited in Benuster's account and purported to be endorsed by the payee Auburn Automobile Company. The endorsement is typewritten on the back of the check and underneath it are the initials, "F. P." Frank Popp was at that time connected with the Auburn Automobile Company as vice-president and general manager, but he did not write this endorsement and the payee company, with which he was connected, was not accustomed to make endorsements in this manner. The check was never in the possession of the Auburn Automobile Company and that company never received the proceeds of this particular check. The plaintiff Bank paid this check in the usual course and charged the same to Anderson's account, and the check according to the

usual practice of the Bank was returned to Anderson at the end of the month. In February, 1926, Anderson notified the plaintiff Commercial Bank that the endorsement of the payee had been forged, and that Bank reinstated his account to the amount of the check and according to custom presented an affidavit to defendant claiming the endorsement had been forged and demanding repayment of the amount of the check.

The circumstances under which the check was given appear to be as follows:

Schuster conducted a business at 2400 North Clark street, Chicago, for the sale of automobiles and did business under the name of Clark Motor Sales Company. Anderson had been in the business of buying and selling horses for about twenty years; his place of business was at Cass street and Grand avenue. He owned an automobile which he kept near to the store conducted by Schuster. Schuster handled a great many used cars and Anderson had known him for about six months. They became quite friendly.

The Auburn Automobile Company conducted a business for the sale of its cars on South Michigan avenue, and Schuster from time to time bought automobiles from it at wholesale prices. Anderson testifies that Schuster was an agent for the Auburn Automobile Company, but Papp, its vice-president, testifies to the contrary. He says that the Automobile Company never sent cars on consignment to him but sold cars to him at wholesale and that he resold them at retail prices; that the Automobile Company did not control in any way the retail price at which he sold, and that it did not deliver any cars to him until he had paid for them.

Anderson had secured a couple of customers for Schuster and Schuster in turn said, "I will get you a car at cost price; I have got to take so many every month, you can have one at the cost price." He didn't have any cars that Anderson liked at his place of business, so Anderson went with him to the salesroom of the Automobile Company

On the 1st day of January, 1933, the following was received from the Department of the Interior, Bureau of Land Management, Washington, D. C.:

They became quite friendly.

Q. Now, you say that the defendant was not a partner in the business, is that correct?

[illegible]

on South Michigan avenue and showed him the model he, Anderson, wanted. On the following day Schuster asked Anderson for a check and Anderson said he would make it to the order of the Automobile company, which he did. In his own handwriting Anderson wrote on the back of the check the motor number (64700) of the automobile he was to receive and the serial number (2641061). Anderson told Schuster to get the car up at any time he could and that he, Anderson, would take it at any time he got ready to deliver it. Schuster was to deliver it at the store on North Clark street. He was to get the car and bring it down and deliver it to Anderson after Anderson had given him the check. After delivering the check Anderson went to the country for two or three days. When he returned he asked Schuster if he had the car and Schuster replied that he would get it in a day or two. A similar answer was given to similar inquiries made at different times. Anderson then went to New Orleans in January. He says that all through December he heard from Schuster, "I will get the car for you," and he says, "We were good friends at that time. You know a lot of times a fellow lets things go by." When Anderson got back from New Orleans February 1st or 3rd Schuster had disappeared and his place of business was closed.

Three days before the date of the check the Auburn Automobile company sold to Schuster the identical car that is referred to by the serial number on the back of the check and it was delivered to him the same day. On November 3th when Anderson delivered his check to Schuster, who deposited it in his account, Schuster did not owe the Automobile company anything on this car, and the Automobile company had no interest in the proceeds of the check. The check given to the Automobile company by Schuster in payment for the car had before that time been cleared through the Lake Shore Bank, and the Automobile company heard no complaint about the endorsement on the check until February, when Anderson learned that Schuster had absconded. For nearly three months after this check had been given, the Auburn

Automobile Company continued to sell cars to Schuster, and when he closed his business and left he used it nothing; he had paid for all the cars he bought.

It is the theory of the plaintiff bank that it was liable to its depositor upon the check in question because the bank was authorized to pay only to the person designated as payee; that having paid the check upon the forged endorsement it was legally bound to reimburse Anderson's account and that having paid the check on the forged endorsement it may recover from the collecting bank. Many authorities, which it is unnecessary to discuss, are cited to these points. There is no question as to the rule of law which controls in such cases, nor can there be any question that negligence on the part of the drawer of the check may not be used as a defense against the drawee bank in such cases. Bankin's Wigard Oil Co. v. U. S. Express Co., 265 Ill. 136; Curtis Bacon Mfg. Co. v. First National Bank of Englewood, 306 Ill. 179.

The controlling question here is whether under the undisputed facts the endorsement on the check can be said to be a forgery. It was undoubtedly unauthorized. It was not the genuine endorsement of the payee, the Auburn Automobile Company, but it is not every unauthorized endorsement which is a forgery, for an essential element of forgery is the intention to defraud, and under the uncontradicted facts in this case it does not appear that there was any intention of Schuster to defraud any one at the time the endorsement was made. Anderson was in no way injured by the fact that Schuster collected this check through his own account. The delivery of his check to the Auburn Automobile Company would in no way have prevented the delivery of the automobile to Schuster, for that was the intention of the parties. Schuster was not the agent of the automobile company but the trusted friend of Anderson, and the typewritten unauthorized endorsement of the name of the automobile company on the check did not

of the same kind, and it is not possible to say that the same kind of thing is not possible in the same way. The same kind of thing is not possible in the same way. The same kind of thing is not possible in the same way.

It is the policy of the Government to provide for the health and safety of the people of the United States. The Government is committed to the highest standards of health and safety, and to the protection of the environment. The Government is committed to the highest standards of health and safety, and to the protection of the environment. The Government is committed to the highest standards of health and safety, and to the protection of the environment.

The following question was asked: "What is the name of the person who is the owner of the property?"

in any way affect or change the situation to the injury of Anderson.

There being no evidence tending to show that the endorsement was made with the intention to defraud or that it in any way deprived Anderson of any right or any property, although unauthorized, the endorsement cannot be held to be a forgery. Caroly Electrical Construction Co. v. Globe Savings Bank, 64 Ill. App. 386; State Bank of Chicago v. Mid-City Trust & Savings Bank, 295 Ill. 557. For that reason the defendant Bank is not liable and the trial court rightly so held.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., concurs.

O'Connor, J., dissents.

34112

H. O. STONE & COMPANY,
Appellant,

vs.

H. CONSER and MELLIE CONSER,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 LA 687²

MR. JUSTICE MARGENTY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover commissions for the sale of certain real estate belonging to defendants. Defendants admitted the sale of the real estate but denied that plaintiff procured the purchaser. There was a trial by jury and a verdict for defendants, upon which the court, overruling motions for a new trial and in arrest, entered judgment.

The contention of plaintiff is that under the evidence it was entitled to recover.

The Consers were the owners of real estate at 4534 Woodlawn avenue, which they desired to sell. On May 12, 1927, Mr. Flanders of the plaintiff company obtained their signatures to a writing giving plaintiff the exclusive right to sell this property at a price of \$17,500. The option stated: "It is understood that this exclusive is to expire sixty (60) days from this date."

Plaintiff put up a sign stating that the property was for sale and that plaintiff was the exclusive agent. Defendants also had a for sale sign on the premises. On July 4th thereafter Dr. Howard, a minister of the Second Presbyterian church, called on defendants and opened negotiations which it is agreed resulted in the sale of this property to the church for \$15,000 on October 7, 1927. Plaintiff was not notified of the transaction and the deal was closed at the office of Oscar Hagen.

The facts just recited are not disputed.

Mrs. Conser testifies that at the expiration of



MR. JAMES H. HARRIS, SECRETARY OF THE BOARD OF

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plaintiff's exclusive right of sale she notified plaintiff to take its sign off the premises. Mr. Flanders, however, for plaintiff testifies that defendants told him on July 5th of Dr. Howard's visit to see the property and asked him "to hustle and get right after them and make that deal." He further says that he called up Dr. Howard, who told him that he liked the property but the price was out of line; that witness then reported to defendants, who told him to "keep after him and find out the best offer we can get;" that he again called Dr. Howard and reported to the Consers that \$15,000 was all the church was willing to offer.

Mr. Flanders further testifies that about the time the exclusive ran out he asked defendants what to do about it and that Mrs. Conser said: "You have your sign there, you advertised it; go ahead and try to make the sale; keep on working on the deal. We are going to pay the regular Real Estate Board commission, the same as we done in the past, and that's 3%. Go ahead and make the deal and see if you can get Dr. Howard to sixteen thousand or so."

This witness also testifies that he kept after Dr. Howard until the Doctor went on his vacation and that he got in communication with him upon his return in October; that at the request of Mrs. Conser he kept in touch with him and that defendants said to him that if he could get around \$15,000 to make the deal.

These conversations are denied by defendants, particularly by Mrs. Conser. Dr. Howard testifies that he does not recall talking with Flanders about the matter at all until after the consummation of the sale. On the contrary Flanders says he talked with Dr. Howard half a dozen times. Dr. Howard further testified that he was not able to say which sign first called his attention to the property.

Cases are cited by plaintiff to the effect that a broker is entitled to his commission if he is the procuring cause

[illegible]

or if the owner and purchaser are brought together through means employed by the broker; and by defendants to the proposition that a broker must be the efficient or procuring cause in order to be entitled to commission, but the issue here seems to be one of fact instead of law. if the jury believed the evidence offered by defendants, plaintiff is not entitled to recover on the facts upon any theory of law, and it is not argued that the verdict of the jury is against the clear weight of the evidence.

The judgment must therefore be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

It is the duty of the government to protect the rights of its citizens, and to maintain the peace and order of the country. The government is responsible for the safety and well-being of its people, and it must take all necessary steps to ensure that the law is upheld. The government is also responsible for the education and development of its citizens, and it must provide the necessary resources to support these efforts. The government is the backbone of the nation, and it must be strong and effective in order to protect the rights and interests of its people.

THE PRESIDENT

OFFICE OF THE PRESIDENT, WASHINGTON, D.C.

WILLIAM E. MUNDIE and
 ELMER C. JENSEN, Doing
 Business as MUNDIE & JENSEN,
 Appellants,

vs.

JAY W. RAPP,

Appellee.

APPEAL FROM MUNICIPAL COURT
 OF CHICAGO.

257 A. 387

3

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs Mundie and Jensen, copartners, sued defendant for services as architects alleged to have been performed by plaintiffs for defendant at his request. Defendant filed an affidavit of merits to the whole demand, denying the employment of plaintiffs and denying the performance of such services at his request.

There was a trial by the court and a finding for defendant, upon which judgment was entered, to reverse which this appeal has been prosecuted by plaintiffs. Defendant has not appeared in this court to support the judgment.

It is the contention of plaintiffs that the finding of the court is manifestly against the weight of the evidence, and they urge that the judgment should be reversed with a finding of facts and judgment here for the amount claimed. These are the only matters which we have found it is necessary to consider upon this record.

The evidence in behalf of plaintiffs tends to show that they are duly licensed architects who have for many years practiced their profession in the city of Chicago; that in the early part of the year 1925 defendant Rapp came to their office and explained that he wished to erect a building on Twenty-second street in Chicago; that he had been looking around for reliable architects and learned of plaintiffs; that he asked what their

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THESE RESEARCHES HAVE BEEN FINANCED BY THE INSTITUTIONAL INVESTMENT

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy of maintaining the value of the pound at its pre-war level. This has been due to a variety of factors, including the fact that the Government has not been able to secure the necessary foreign exchange to finance its policy.

There was a study of the social and economic conditions of the Negro population in the United States, and the results of this study were published in the form of a book, "The Negro in the United States", by the same author.

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charges for such services would be and what the services would consist of; that Mr. Bourke of plaintiffs' firm explained that their services would include designing, drafting, specifications, consultations, supervision, up to and including the completion of the building, and also the mechanical and structural engineering; that defendant Rapp asked what fee plaintiffs would charge and Mr. Bourke told him it would depend a good deal upon the type of building, whereupon Rapp described the proposed building to Bourke who said that the charge "for an operation which I presumed would be under one hundred thousand dollars, would be six per cent for our full complete services."

Mr. Rapp returned a day or two later, and Mr. Bourke explained to him that their usual practice was to draw up a contract for their services. Rapp said that he wanted to go ahead with the operation in a hurry and gave details of the new building, stating that he wished primarily a commercial building but that he also wished living quarters on the top floor. He said that almost all the buildings he had looked at of that type showed an entrance to the store portion and a side entrance to the apartment portion and wondered if that could be overcome. Mr. Bourke said to give him an opportunity to study it and that he would report in a day or two; that the next time Rapp came in Bourke presented a written contract. Rapp then said he had a very elderly gentleman as a partner by the name of Hoy Yoon, in whose name the property was, and Mr. Bourke explained that the contract would then have to be drawn in the name of Hoy Yoon instead of Rapp; that Rapp said he would have to take the contract up with his partner and would let Mr. Bourke know in a day or two. Rapp also at that time discussed further details of the building and took the contract with him, saying he would see to the signing of it but that it might take a few days; that he wanted sketches developed.

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A day or two later he came back and had a conversation with Mr. Bourke in the presence of Mr. Jenson concerning the requirements of the structure. Mr. Bourke gave him some sketches which had been prepared to show his partner, some but not all of which have been returned.

Bourke testifies that Rapp said that he was satisfied with a fee of six per cent to be based upon the cost of the building, and at the time the written contract was handed to him said, "You may go ahead with this. Hoy Yoon is a very old gentleman who does not know very much English. I handle the business myself for this firm. You can take my word for it. We will go ahead because we are in a hurry. I will leave this contract to be signed up in a very short while."

After that conversation Mr. Rapp came in practically every day and sometimes twice a day to talk about the different details on the sketches. Bourke says that he made 20 or 25 sketches; that Rapp would come in from day to day and inject other features connected with his business and he decided to add a dark room, then a green room and a root room; that Rapp wished private living quarters for his employees aside from the apartments on the top floor; that the questions of whether he wanted to have a sales basement or do the selling on the second floor, making the basement storage, and to have some living rooms on the second floor connected by a pair of stairs with the first floor, and a lot of intricate details that do not go into a commercial building because of the nature of his business, were considered.

Mr. Bourke testifies that he spent personally in the preparation of sketches and consultations easily fifty hours; that besides working on these sketches himself the drafting room put in forty-three hours.

On January 20, 1936, Rapp came in and Bourke urged

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him to sign the contract, stating that they had put in a lot of time and it was unusual to do that sort of thing. Rapp then said he had been having difficulty with the former owner of the property; that when he bought the property there was a building on it which was to be wrecked by the former owner; that the owner would not wreck certain things as agreed and he wanted to know if plaintiffs would help him out on it. It was a question of removing certain basement walls, and Mr. Bourke told him that it might be well to leave the basement walls in. Plaintiffs' engineer was sent to look that matter over, and his report was submitted to Mr. Rapp. Rapp was not satisfied with the estimate of this engineer, and Mr. Bourke had another company make an estimate for him.

By February 10th the sketches were well along and an estimate of the cost of the building had been prepared. Bourke showed it to Rapp, pointing out the details and how the cost was made up, and Rapp said that if that was what the building would cost plaintiffs would have to go ahead on that basis. This estimate showed a cost of \$72,236 for the building.

Rapp came again to the offices of plaintiffs in March and took out various drawings, and Bourke told him and Roy Yoon that plaintiffs were going further with the operation than they usually did without signing a contract, whereupon Rapp laid the contract down on the table and said that it was all right but that they would have to make a loan on the building and asked if plaintiffs would take some notes in payment of their fees. He was told they did not usually do so, but asked what the basis would be, and Rapp said that their attorney would call plaintiffs up and let them know. Later one Penwell (an attorney) called up plaintiffs and discussed the matter, but on objection of defendant the conversation was, we think, erroneously excluded by the court. Thereupon Bourke prepared and handed to Mr. Rapp another contract

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which Rapp said he would like to check up with his attorney, and Bourke told Mr. Rapp at this time that he would not go ahead with working plans unless he signed the contract.

Plaintiffs also offered to show that an inspection of the completed building showed that the work prepared by plaintiffs was used in erecting the building, but this evidence also, we think, erroneously was excluded by the court.

The last conversation between Bourke, who represented plaintiffs, and Rapp took place on March 18th and thereafter plaintiffs were unable to reach Rapp by telephone. He never returned the written contract. Rapp was in the offices of plaintiffs 25 to 30 times and would remain each visit from one and a half to three hours.

Evidence offered by plaintiffs showed the value of their services was one-fifth of the entire fee based on the cost of the building; that this was the usual and customary fee for architects at that time, and that on October 10, 1928, they rendered a bill to Rapp for one per cent of the estimated cost of the building, or \$722.35.

The testimony of Bourke is corroborated by Mr. Jensen or plaintiffs' farm, who was present at some of the conversations. Rapp was produced as a witness and stated that he was a Confucianist and believed in "lots of gods." His testimony was objected to on the ground that the oath would have no meaning to him. The court intimated that he would permit him to testify, but the attorney for defendant voluntarily withdrew the witness. The evidence therefore as to Bourke's conversations with Rapp was not denied, although one Kong testified for defendant as to certain matters which we do not regard as controlling.

Upon this record it appears without contradiction

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that defendant Rapp told the representative of plaintiffs to go ahead with the work with the understanding that he, Rapp, would have the contract signed but that he never procured such signature and that plaintiffs were prevented from fully carrying out the contract by Rapp's conduct. Under such circumstances plaintiffs are entitled to recover upon a quantum meruit for the services actually rendered.

For the reasons indicated the judgment is reversed with a finding of facts and judgment here is favor of plaintiffs and against defendant Rapp for \$722.35.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE.

McSurely, P. J., and O'Connor, J., concur.

(OVER.)

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FINDING OF FACTS.

We find as facts that plaintiffs, William E. Mandle and Elmer C. Jensen, copartners as Mandle & Jensen, were and are duly licensed architects conducting a business in the city of Chicago; that defendant Jay W. Rapp in January, 1928, employed plaintiffs as architects to furnish services in connection with the erection of a building estimated to cost \$72,335; that it was agreed that said Rapp would procure the execution of a written contract with plaintiffs for the performance of all necessary services as architects in connection with the erection of said building; that said plaintiffs were ready, able and willing to perform such services and to carry out said agreement but were prevented from so doing by the default of said defendant Rapp; that the customary, usual and reasonable charges for the services actually performed by plaintiffs at the request of said Rapp in connection with said proposed building was \$722.35, which said sum this court finds to be due from the said Jay W. Rapp to plaintiffs Mandle and Jensen, and that judgment should be entered in this court upon said finding for said amount of \$722.35.

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22. 'The other, though, is that the 'other' is not a 'thing' but a 'person'.

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Reference is made to the letter of 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 2689-2690, 2691-2692, 2693-2694, 2695-2696, 2697-2698, 2699-2700, 2701-2702, 2703-2704, 2705-2706, 2707-2708, 2709-2710, 2711-2712, 2713-2714, 2715-2716, 2717-2718, 2719-2720, 2721-2722, 2723-

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Special Agent in Charge J. Edgar Hoover and the United States Department of Justice

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Approved for Release by NSA on 09-11-2013 pursuant to E.O. 13526

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HUGOLINE BRINKER and CHARLES J.
DE LEUW, Doing Business as
KILMER, DE LEUW & COMPANY,
Appellees,

vs.

ROBERT E. McLAIN,
Appellant.

37
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

237-1-637 4

MR. JUSTICE BACCHETT DELIVERED THE OPINION OF THE COURT.

Kelker and others, copartners and engineers, filed a petition for mandamus praying that McLain, mayor of the City of Park Ridge in Cook county, should be directed in behalf of the City to execute a certain contract whereby the petitioners were employed in their professional capacity. A demurrer was sustained, and by leave an amended petition filed. Respondent again demurred. This demurrer was overruled, and respondent electing to stand by it, judgment was entered that the writ issue.

The question to be decided is whether the petition avers facts showing that petitioners are entitled to the writ.

The petition avers in substance that the City of Park Ridge is a municipal corporation organized under an act approved April 10, 1872, as amended; that its legislative authority is vested in a city council consisting of the mayor and ten aldermen; that a municipal code was adopted and is in force; that the City is divided into five wards, each represented by two aldermen. The petition names these aldermen and states that the city clerk was William J. Becker; that with reference to the powers of the mayor the code provided:

"1. Chief Executive.

The mayor shall be the chief executive officer of the city. It shall be his duty to perform such duties as may be required of him by ordinance or by statute, and to see to the enforcement of all ordinances.

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WASHINGTON, D.C.

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1. The purpose of this report is to provide a summary of the results of the investigation conducted by the Department of Defense, Office of the Inspector General, in response to the request of the House of Representatives, Committee on Government Operations, Subcommittee on Government Management and Organization, for a study of the Department of Defense's financial management system. The study was conducted from October 1962 to March 1963, and the results are presented in this report.

2. The study was conducted in accordance with the terms of reference set forth in the request of the House of Representatives, and the results are presented in this report. The study was conducted by a team of experts in the field of financial management, and the results are presented in this report.

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2. Supervision over officers.

The mayor shall have general supervision over all the officers of the city. He shall have the power, in case of dispute, to determine questions as to the relative powers of city officials or boards. And he may assign to any officer any duties which are to be performed but which have not been assigned by statute or ordinance to any particular officer.

6. Signature.

The mayor shall sign, on behalf of the city, all licenses, contracts to which the city is a party, warrants and permits; and no such instrument shall be valid without the mayor's signature, in the absence of a specific ordinance or statutory provision to the contrary."

The petition also avers the time of the regular meetings of the city council, the manner in which special meetings of the council shall be called and the place where such meetings shall be held, the manner of the appointment of committees, and the general method of procedure in the council.

It avers the appointment on May 7, 1929, of certain named aldermen as members of the committee on special assessments, and that they accepted and acted; that on August 15, 1929, an employee of petitioners appeared before this committee and other aldermen who met with them and presented copies of the proposed agreement for employment. This contract, which was for engineering services, is set up verbatim.

The petition also avers that a special meeting of the council was called for August 19, 1929, the notice for said meeting stating that it was for the purpose of passing upon said question of employment; that said council met in special session on August 1929, pursuant to the call; that the mayor and the clerk were present; that the call was read; that a motion was made by Alderman Jenkinson that the contract between petitioners and the City of Park Ridge be accepted by the council, to be properly signed by the city officials; that the motion was seconded by Alderman Delaker; that it being stated that the contract had not been read, a copy of the contract was given to the clerk with the statement,

2. Unofficial

The report shall contain all the information which the committee has received from its members, and shall be submitted to the committee in a written form. It shall be the duty of the committee to consider the report and to make such recommendations as it may deem proper. The report shall be submitted to the committee in a written form, and shall be accompanied by such other documents as may be necessary to explain the facts and circumstances of the case.

3. Official

The report shall be submitted to the committee in a written form, and shall be accompanied by such other documents as may be necessary to explain the facts and circumstances of the case. The report shall be submitted to the committee in a written form, and shall be accompanied by such other documents as may be necessary to explain the facts and circumstances of the case.

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"All right, you read it;" that Mayor McElain said, "No, it is too late now; let's call the roll on it;" that the roll was called and that the city clerk announced that six aldermen voted "yes," three "no," and one was present but "not voting," and that the mayor declared that the action was carried; that the meeting then adjourned until September 3, 1929; that the city clerk kept a record of the proceedings; that the meeting on September 3rd was called to order; that the clerk read the minutes of said meeting of August 19th; that said record was amended by motion, all members present voting in the affirmative.

The petition further sets up that the code prescribed that the fiscal year of the City should begin on the 1st day of July, and that the action of the council on August 19, 1929, in accepting said contract was therefore taken within the first quarter of the fiscal year then current; that at a regular meeting of the council held July 16, 1929, an Appropriation ordinance was passed, which ordinance was approved by the mayor and attested by the city clerk and is set up verbatim in the petition.

The petition avers that no further appropriation was passed within the first quarter of the current fiscal year; that said appropriation ordinance was not published within thirty days in a newspaper published in the city, or in book or pamphlet form, and was not at any time posted in three public places in the city; that in fact the ordinance was not published until September 6, 1929, when it was published in "The Park Ridge Herald," a newspaper published in said city; that there was therefore no appropriation ordinance in force in 1929.

The petition further avers that it was the duty of the respondent to sign the contract on behalf of the City, which he failed and refused to do, and correspondence between petitioners and the mayor leading up to that refusal is set up.

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Respondent contends in the first place that the action of the council in approving the contract did not conform to certain provisions of the Cities and Villages act (see Revised Stat., chap. 24, art. 5, par. 65, secs. 7, 71 and 102.) It is contended that the subject matter of the contract concerns the relations of the officers and employees of the City of Park Ridge; that the action was legislative in its character and therefore should have been expressed in the form of an ordinance; that a city can contract for labor or services only by ordinance; that legislative acts of a city council must be in the form of ordinances that are subject to supervision by the mayor.

In support of these contentions, City of Allen v. Mulledy et al., 21 Ill. 766 and Town of New Athens v. Thomas et al., 82 Ill. 259, are cited.

In the City of Allen case the city employed a railroad company to construct a levy and in connection therewith authorized it to remove certain earth from Third and Fourth streets of the city. The Railroad company employed Mulledy and others to do the work. As it was easier to take the dirt from Landon street, the plaintiffs did so. The city engineer and the committee having charge of the improvement saw plaintiffs doing this and made no objection. Plaintiffs sued the City in assumpsit for work and labor and recovered a judgment. Upon appeal by the City to the Supreme court, it was held:

"The city, as an incorporation, could only bind itself for the payment of money for labor done for its benefit, by ordinance or by resolution, or it might by either of these modes authorize its officers or agents to make such contracts. The contract which was entered into by the city, was with the company and not with the defendants. They were strangers to that contract, and must look to the company for compensation unless they can show a binding contract with the city."

The judgment was reversed.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a genuine organization or a front organization for the Soviet Union.

is composed of three members, the President, the Vice President, and the Secretary. The President is elected by the members of the Association for a term of three years. The Vice President is elected by the members of the Association for a term of three years. The Secretary is elected by the members of the Association for a term of three years. The President, Vice President, and Secretary are elected by the members of the Association for a term of three years.

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In the New Athens case, Thomas and others sued the city of New Athens for attorney's fees. The facts appear to be that plaintiffs were in the first instance employed by citizens and taxpayers to bring proceedings to test the legality of certain bonds; that proceedings were instituted and resulted in favor of the city, without, however, bringing the desired result. The bondholders made a proposition for settlement and a public meeting was held, at which plaintiffs at the request of the president of the town made an address explaining the proposed compromise settlement. The meeting voted to accept the compromise and directed plaintiffs to prepare a settlement ordinance to be submitted for adoption. Plaintiffs prepared the ordinance, and it was afterwards submitted to the people and adopted.

Thereafter the council by ordinance allowed the plaintiffs a fee of \$500 for their services. They declined to accept this in full of their services but instituted suit and recovered a judgment for \$1,000, from which the town appealed to the Supreme court. The opinion states:

"The usual manner in which a city or incorporated town contracts or binds itself for the payment of money for labor or services rendered, is by ordinance or resolution adopted by the governing council of the incorporation.

In other words, an incorporated town speaks, acts and becomes bound for the performance of obligations, by its ordinances or resolutions adopted by the legislative branch of the incorporation."

The opinion also quotes with approval the statement of Chancellor Kent in his Commentaries, vol. 2, sec. 321, to the effect:

"That corporations can now be bound by contracts made by their agents, though not under seal, and also on implied contracts, is to be deduced, by inference, from corporate acts, without either a vote, or deed, or writing, is a doctrine generally established in the courts of the several States, with great clearness and solidity of argument."

The court said it was satisfied that the acts of the town from the time of the beginning of negotiations until the final settlement might be regarded as a sufficient ratification of the

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employment to authorize the verdict of a jury, and the judgment was affirmed.

These cases rightly understood do not sustain the contention of respondent. Moreover, in City of Round City v. Mason, 362 Ill. 392, upon an appeal from a judgment assessing compensation in a proceeding brought by the City of Round City under the Eminent Domain act for the condemnation of land, it was urged that the petition of the City did not allege that any ordinance had been passed directing the improvement to be made, but the court held, citing numerous authorities, that where a city council has power to act and the charter does not prescribe the manner of action, it may accomplish its purpose by resolution as well as by ordinance. In the later case of Finkle v. Coffin, 282 Ill. 599, one Jacob L. Jacobs, an employee of the City of Chicago, sought by mandamus to compel the civil service commissioners to restore him to his position of expert on system and organization, from which he had been suspended without compliance with the terms of the civil service law, and the court there stated:

"An employment by a municipal corporation, in the absence of statutory or charter provisions, need not necessarily be by a formal ordinance, by-law or resolution. It may be by contract, express or implied."

We find nothing in the provisions of the statute cited in the brief that would require this contract (which by its terms seems to practically be limited to services in connection with local improvements and which expressly provides that it may be terminated at the end of thirty days) to be made only by legislative action, which would require a formal ordinance. The improvements could not be made, of course, without such ordinance, and in that case the mayor of the city might exercise his power of veto in such manner as to effectually check any unwise legislation. As petitioners point out, the services required by the contract seem to be of two classes - (1) services preliminary to the passage by the council of any ordinance for municipal improvements,

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and (2) services necessary to carry such ordinances into execution. The mayor has an undoubted right to veto such ordinances and prevent the improvements except upon concurrence of two-thirds of the council, and the right of the mayor in this respect is not in any way affected by this contract. We think it must be held that the city council by resolution accepted the contract and that a formal ordinance was not required in order to bind the City.

It is next contended that the contract is void because no appropriation for payments to be made thereunder had been made at the time the motion to accept the contract was passed on August 19th. Section 4 of article 7 of the Cities and Villages act, chap. 24, p. 336, provides:

"No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

Section 306 of chapter 38, par. 436 of the Criminal Code provides in substance that any person holding a public office, trust or employment, who shall be guilty of any palpable omission of duty or who shall be guilty of diverting any public money from the use or purpose for which it may have been appropriated or set apart by or under authority of law, or who shall be guilty of contracting directly or indirectly for the expenditure of a greater sum or amount of money than may have been, at the time of making the contracts, appropriated or set apart by law where no special provision has been made for the punishment thereof, shall be fined not exceeding \$10,000 and may be removed from his office, trust or employment.

Respondent urges that the contract was therefore void and cites to this point DeRam v. City of Etrator, 232 Ill.App.135; reversed in 316 Ill.123; Selby v. Village of Winfield, 255 Ill.App.67. These

It is not possible to give a full account of the work of the Commission in this field. The Commission has been very active in the field of human rights, and has been successful in securing the release of many prisoners of conscience. It has also been successful in securing the release of many political prisoners. The Commission has been very active in the field of human rights, and has been successful in securing the release of many prisoners of conscience. It has also been successful in securing the release of many political prisoners.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

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cases hold in substance that a contract made by a city whereby it undertakes to obligate itself to pay out of the general fund for services for which no appropriation has been made, is void as violating the statutes. Section 94 of the Local Improvement act (Cahill's Ill. Rev. Stat. 1929, chap. 24, p. 362), which provides that in making an assessment a sum not to exceed six per cent of the amount of the assessment may be applied for costs and expenses, further provides:

"The limitation in the foregoing proviso shall not apply to the costs of engineering and inspection connected with any local improvement, but such costs in cities having a population of less than 100,000 as aforesaid, may be included in the cost of the improvement to be defrayed by special assessment or special tax."

The contract here in question provides that the city employs the engineers "to render the services hereinafter set forth and all other engineering services necessary to the proper completion of all improvements to be undertaken by the city, which services the engineers shall perform." It provides that "customary advisory services required by the city" shall be performed without charge. As to fees and payments it provides:

"(a) Upon confirmation of any special assessment or special tax (or upon the letting of the contract for any improvement not to be paid for by special assessment or special tax), a sum equal to two and one half per cent ($2\frac{1}{2}\%$) of the estimated cost of the improvement.

(b) During the progress of the work, as and when payments are made to the contractor, a sum equal to one half of one per cent ($\frac{1}{2}\%$) of the amount due and payable for work done, until the full amount of three per cent (3%) of the total cost of the improvement has been paid; it being understood that the engineers shall in no event receive in the aggregate more than three per cent (3%) of the actual cost of any improvement as compensation for all services performed hereunder in connection with such improvement.

(c) Payment may be made in cash, or in interest bearing special assessment or special tax vouchers or bonds."

We think it must be held that the contract is one requiring services in connection with local improvements for which assessments are to be levied and that section 4 of article 7, chap. 24 of the Illinois Revised Statutes is not applicable. It is so

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101. Proposed by Dr. J. H. ...

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held in Case v. Village of Wilmette, 230 Ill. 426, and Harris v. Harper, 249 Ill. App. 836. See also Midland Lumber Co. v. City of Dallas, 276 Ill. 172.

The fiscal year of the City of Park Ridge began on July 1st. It appears from the averments of the petition that an Appropriation ordinance was passed by the city council July 15th, but it was not published until September 6th thereafter. This ordinance appropriated for general corporate purposes the sum of \$207,500, one item of which was \$10,000 for a contingent fund. Another item appropriated was \$12,000 for repairs under street department, and still another was \$5,000 for repairs under water department. If the contract here in question should be construed in any part to require payments from the general fund, we think the appropriation for contingent expenses would sufficiently cover the item. People v. Cairo V. & C. Ry. Co., 247 Ill. 560; People v. C. & N. I. R. Co., 249 Ill. 549; McGovern v. City of Chicago, 261 Ill. 364; Hurd v. City of DuQuoin, 173 Ill. App. 515.

Petitioners also contend that since the contract upon which suit is based was authorized in the first quarter of the fiscal year, no proper appropriation was required to render it valid, even if it imposed an expense on the general fund of the city. Ordinances making appropriation are required by law to be published within one month after their passage and take effect ten days after publication. Section 104, article 3, Cities and Villages act. That an ordinance which has not been published as required by law is invalid, has been held in People v. Bowman, 263 Ill. 234. In City of Danville v. Danville Water Co., 160 Ill. 235, our Supreme court said:

"The passage of such annual appropriation bill at any time within the first quarter of the fiscal year answers the demands of the statute. Within that period of first quarter of the fiscal year which may ensue prior to the passage of an annual appropriation bill or ordinance, the city council may enter into any contract and incur any expense not otherwise unlawful without an

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1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a formal address, and it is the first of its kind since the signing of the Constitution. The President, James Buchanan, is addressing the Congress, and he is doing so in a very formal and dignified manner. He is discussing the state of the Union, and he is discussing the issues that are facing the country at that time. He is also discussing the role of the President, and he is discussing the responsibilities of the Congress. The letter is a very important document, and it is a very interesting one to read. It gives us a glimpse into the mind of a President, and it gives us a glimpse into the state of the country at that time.

appropriation therefor having been previously made, but may include the appropriation therefor in the general appropriation bill to be thereafter enacted within the said first quarter of the fiscal year."

This contract having therefore been made within the first quarter of the fiscal year and at a time when no valid appropriation ordinance had been passed, it was the duty of the city council of Park Ridge to make the necessary appropriation therefor, and such duty would be enforced upon a proper showing by mandamus. Fessle v. City of Chicago, 244 Ill. App. 66.

Respondent further contends that this contract was invalid because it was not awarded upon competitive bids, citing section 56, paragraph 121, article 9, chapter 24 of the Cities and Villages act, which provides in substance that in any work or other public improvement to be paid in whole or in part out of a special assessment when the expense should exceed \$500, the contract must be let to the lowest responsible bidder. That statute, however, has no application to contracts for professional services. 44 Corpus Juris 102; 3 McQuillin, Mun. Corp. (2nd ed.) 866; Franklin v. Horton, 97 N. J. L. 25.

The petitioners have, we think, shown a clear right to the rule prayed for, and the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

PEOPLE OF STATE OF ILLINOIS,
ex rel. MADELINE BOONE,

Appellee,

vs.

BASON FIELDS,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 I.A. 638

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant and defendant, Bason Fields, upon the trial of this cause was found to be the father of a male child born to the relatrix, Madeline Boone, July 29, 1929, which child would be deemed a bastard. An order was entered that defendant should make the usual payments in support of the child. Motions for a new trial and in arrest were overruled and judgment entered, to reverse which this appeal has been perfected.

It is urged in the first place that the judgment is contrary to the law because there was no proof that at the time of conception and birth of the child the mother was an unmarried woman. However, since the amendment of our statute, which went into effect July 1, 1919, a married as well as an unmarried woman may maintain such proceeding, (People v. Clemenicki, 221 Ill. App. 475; People v. Glass, 239 Ill. App. 86) although it is apparent that this amendment did not in any way change the common law presumption as to the legitimacy of every child born in wedlock. (Cartwright v. McGown, 121 Ill. 348; Orthwein v. Thomas, 127 Ill. 334; In Re Matthews Estate, 47 S. E. 901; 7 Corpus Juris 942--Note 35A).

The controlling question in this case is whether the judgment is clearly and manifestly against the weight of the evidence. The finding of the trial court is in favor of the relatrix and this finding is entitled to ^{the} same consideration in this court as the verdict of a jury.

The relatrix is 20 years of age. She came to Chicago from Erie, Illinois, about two years prior to the trial of this

case to live with an uncle. She went from his home to the Salvation Army Home because she was pregnant, and she there gave birth to another child. The record is silent as to whether this child is living or dead, as to whether the relatrix was then married or unmarried and as to whether this former child was legitimate or illegitimate.

On September 8, 1928, defendant Fields was living with his mother in a six-room apartment at 6526 Hubbard Avenue in Chicago; he was unmarried and was employed as a Field Scout Executive of the Boy Scouts of America.

The relatrix was under the supervision of the Illinois Children's Home and Aid Society and under the immediate direction of Mrs. Madeline Evans, an employee of the Society. The relatrix was placed in Field's home by this Society on September 8, 1928. She attended the Englewood High School and after school hours was accustomed to do general housework. The apartment was on the second floor; relatrix slept in the rear of the apartment and defendant's room was next to that occupied by her. Defendant's mother occupied the front room. Fields, his mother and relatrix went to church together on Sundays. Relatrix says that Fields talked with her about her school work and Latin and said she might get a scholarship at the University of Chicago, but that he never promised to get her any clothes. On November 19, 1928, at her request defendant Fields wrote an excuse in her behalf accounting for her absence from the school, and this seems to have been the extent of their association together up to the time at which she testifies their illicit relations began.

Her testimony is to the effect that on November 1, 1928, defendant Fields came to her room at about 2:30 or 3:00 o'clock in the morning. She says that she woke up and found him with her in her bedroom; that she made no outcry; that the same thing

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happened on November 8th, 10th and 19th, and December 1, 1929.

She says she never reported Mr. Fields to the Illinois Home and Aid Society; that she tried to tell Mrs. Evans but that Mrs. Evans would not listen to her, and that when she called Mrs. Evans hung up; that she called Mrs. Evans again and Mrs. Evans said relative was to leave for Cincinnati on December 17th; that when she started to tell Mrs. Evans about her condition and about Mr. Fields Mrs. Evans again hung up.

She further says that she called defendant Field on December 16th and he said he would be over the next day; that he came over on the 17th and she got in his car and they drove to some one's house, she thinks it was Dr. Plummer's; that from there Fields took her to a drug store at 47th street and Langley avenue and brought out some medicine which he gave her, telling her to take it and write to him after she got to Cincinnati and tell him how it worked; she said she was sure it was Roberts drug store; that she "was not making any mistake;" further that when Fields gave her the packages they were wrapped in paper and had no drug store signature on them. She emphatically denied that she stated in the presence of Mr. Williams and Mr. Fields that Fields got these exhibits "from Stevens drug store," and said that she told Mr. Williams and Mr. Fields that she complained to Mrs. Evans about Fields. After an adjournment of court, upon redirect examination, she stated that she had made a mistake in giving the name of the drug store; that she said "Roberts drug store" but meant Stevens drug store. She also said with reference to this matter that she had stated several times in the morning that she "did not know exactly."

She says that she quit the Englewood High School on December 12; that she told Fields about her condition on December 6, 1929; that he said he was going to have her sent back for being

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 DIVISION OF THE PHYSICAL SCIENCES
 DEPARTMENT OF PHYSICS
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disobedient; that she told him she was going to turn her books in at the Englewood High School and did turn them in December 12, 1929, when she went to the home of her cousin at 4330 Vincennes ave.

The packages which she says were given Herby Fields were produced and marked as the State's Exhibits I and II. No. I appears to have been cayenne and No. II mustard powder, and relatrix testifies that Fields told her that these articles were for the purpose of producing an abortion. She had first said that these articles had been in her possession all the time after she received them from Fields; that she did not see Fields make the purchase. Later she said that ^{when} Fields gave the packages to her they were wrapped in paper and had no drug store signature on them; that she turned them over to Miss Lewis, a visiting nurse for the Home and Aid Society. Miss Lewis testified that she received these articles from relatrix on June 18, 1929; that they were in the same condition as when she received them; that they had been out of her possession only about a week or ten days; that she had had them in her possession from July 15th up to the time of the giving of her testimony.

Clarence V. Williams, superintendent of the Illinois Children's Home and Aid Society, testifies that he sent for Defendant to come to his office in June, 1929, and showed him a letter from that Society in Cincinnati; that Fields read it and said, "These are serious charges," to which the witness replied, "You had better get this straightened out." The witness says he asked Fields if he was guilty and that Fields said in the presence of Miss Lewis and Madeline that he was not guilty; that he, the witness, then said, "Let us talk this matter over and get at the truth of it;" that Fields said, "Madeline, you know this is not true;" that relatrix replied, "You know what you promised to do for me. You promised to get me out of all of this." The witness further

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says that about 15 minutes later he talked with Fields "as man to man" and told him he wanted to know the truth; that Fields said "I would like this matter settled quietly;" that the witness asked, "Are you guilty?" and that Fields replied, "No," to which Williams said, "There can be no adjustment." Mr. Williams says he again sent for Fields on June 15th and asked him practically the same question and that Fields replied he was not guilty; that he would like the matter settled quietly; that he wanted a little time to think about it. The witness said again that there could be no adjustment unless defendant stated he was guilty.

Beatrice Mann, supervisor and director of the Home and Aid Society, testified that she was present at a conversation on Wednesday, June 15th; that Mr. Williams, Miss Lewis, Relatrix and Fields were present; that Mr. Fields was asked if the charges brought against him by Madeline were true and he flatly denied them; this witness says that at the next conversation Mr. Williams said, "Mr. Fields, we want to help you and we want to know the truth of this matter;" that Fields said he was willing to make a quiet settlement of the matter but that he was not guilty; that Mr. Williams and she, witness, told him that a settlement without a plea of guilty was not possible. This witness says, "He always denied his guilt and asked for a little time to think about it; that the situation took him off his feet."

Defendant testified, denying in detail the testimony of Relatrix insofar as it indicated his guilt. He says he never promised to get her a scholarship; that he never visited her room on the days named by her and that he never had sexual intercourse with her; that he wrote the excuse because she told him that she was out of school the day before to visit her sick sister; that he told her that he would do it that time but he did not want it to happen again. He says that when called before Mr. Williams and

questioned with reference to the letter from the Society in Cincinnati, I said, 'There is not a word of it true.' I said, 'I would be glad to face the girl;' that three or four days later Mr. Williams telephoned him that reatrix was in his office and that he went over immediately; that at that conversation he told Mr. Williams he was not guilty and he told Madeline she knew not a word of it was true; that she knew this would ruin him; that he wanted the matter settled out of court quietly because he had so much at stake; that he was to be married in a few days; that he and Williams went into a private room and Williams said their cases were cases of adjustment and not of prosecution; that he said, 'If you are guilty or might be guilty admit it and let me help you;' that he said there could be no adjustment without an admission of guilt. Defendant says he told Williams he wanted a day or two to think about it; that his reputation was at stake and that he did not know what to think; that he saw Williams again; that Williams again asked him if he were guilty and he said "No;" that he wanted to see his lawyer. Defendant was married June 27, 1928.

Defendant specifically denied that he had ever seen exhibits numbers I and II, denied that he ever went to the Stevens or Roberts drug store on December 17, 1928; denied that he ever drove Madeline to any drug store; says that he was at home sick in bed the first week of December until after Christmas; that he did not go to 4619 Michigan Avenue and take Madeline to a doctor's house; that Madeline never told him she was pregnant on December 6, 1928.

An executive of the Englewood High School, who had charge of the school records, produced them and they show that reatrix entered that school September 12, 1928, and that the last time she was at the school was on December 4th and not December 12th as she testified. It also shows, contrary to

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her testimony, that she was frequently absent from school.

Mrs. Madeline Evans testifies that she had a conversation with relatrix on December 17th but she says that defendant's name was not mentioned; that relatrix never tried to make a complaint to her over the telephone about defendant and that she never hung up on relatrix.

Stevens, a druggist at 701 East 47th street, examining the exhibits testifies that he could not say that exhibit I came from his store; that it was sold on prescription only and that his store did not sell medicine in packages like exhibit I; that their boxes were labeled and had written directions as the law required. Exhibit II, he testifies, was mustard powder and was sold to anybody.

Dr. Frank Plummer testifies that he visited defendant Eason Fields on December 17, 1928, at about seven o'clock in the evening; that defendant was then in bed and that he, witness, wrote a prescription for him; that defendant was suffering from la grippe.

Evidence was also produced to the effect that the reputation of defendant for chastity and veracity in the community where he lived was good.

As already stated, the controlling question in the case is whether the judgment is clearly and manifestly against the evidence. It is quite impossible to read this record without reaching the conclusion that the testimony of relatrix is quite unreliable. She is not without experience in matters of this kind, and she gives an improbable account of the way in which the alleged improper relations between herself and defendant began. Her testimony fails to disclose any prior intimacy that might lead this defendant to go to her room without her knowledge and conduct himself in the manner she said he did without causing her to make

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an outcry. In that respect her testimony is inherently improbable. She fixes precise dates for their supposed illicit acts which, in the absence of calendars, diaries or memoranda, would indicate a most extraordinary memory. She is impeached as to the date of her leaving school by the school records, and after testifying positively that the drug store visited was Roberts drug store, she went back to the stand to say that she was mistaken, that it was Stevens drug store, and denied that she talked with anyone in the meantime although the attorney had already indicated to the court that she had communicated this fact to him. She testifies that she told defendant that she had become pregnant on December 6, 1926, yet she states her last menstruation was on November 10, 1926, in which case she would not have known of her pregnancy on December 6th. She waited seven and one-half months before making a complaint against defendant and then made it just two weeks before he was to be married, and the warrant for his arrest, as the record shows, was taken out only eight days before his marriage. The school records also contradict her testimony when she says she was absent at no other time than that concerning which defendant wrote the excuse. She is impeached on material matters by Mrs. Evans, and Dr. Flummer testifies to facts showing that at the time of the alleged visit to the drug store defendant was at home ill in bed and attended by his physician. The testimony of the druggist also tends to show that her testimony in that regard is untrue.

The testimony produced in her behalf shows that while great pressure was brought upon defendant to acknowledge his guilt, he steadfastly refused to do so. Because of his position and his work, he would of course desire, as he stated, that the matter be settled quietly. In view of the improbability of the story which relatrix relates, in view of the fact that her evidence is practically uncorroborated, in view of the fact that she is positively

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impediment upon material matters, justice seems to demand that this judgment be held to be manifestly against the preponderance of the evidence. People v. Cutler, 200 Ill. App. 459; People v. Smart, 203 Ill. App. 359.

For that reason the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

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33743

PHILADELPHIA RAPID TRANSIT COMPANY,
a Corporation,

Appellant.

vs.

COAST PINE & CEDAR PRODUCTS COMPANY,
a Corporation,

Appellee.

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APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 1-4, 888²

ADDITIONAL OPINION ON REHEARING.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On March 17, 1930, we filed an opinion in this case where the conclusion was reached that the judgment must be reversed and the cause remanded. After filing the foregoing opinion we allowed a rehearing on the petition of the plaintiff to determine the sole question whether, instead of reversing the judgment and remanding the cause, we should enter judgment in this court in favor of the plaintiff. An answer to the petition for a rehearing has been filed by the defendant, and we have again considered the question on which the limited rehearing was allowed, and upon such reconsideration we are in accord with our former opinion and the conclusion reached. It therefore follows that the judgment of the Municipal court of Chicago must be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, F. J., and Hatchett, J., concur.

33743

PHILADELPHIA RAPID TRANSIT
COMPANY, a Corporation,
Appellant,

vs.

COAST FIR & CEDAR PRODUCTS
COMPANY, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

253 1A. 658²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover damages claimed to have been sustained on account of the defendant's breach of a contract entered into between the parties for the purchase and sale of 50,000 railroad cross ties. There was a jury trial and a verdict and judgment in the defendant's favor and plaintiff appeals.

The record discloses that in the spring of 1925, plaintiff was desirous of obtaining some railroad cross ties to be used by it in Philadelphia and sent out requests by mail to concerns from whom plaintiff thought it might obtain the ties. One of these requests was sent to the defendant's Chicago office. Defendant's Chicago representative then took the matter up with the defendant's home office in Portland, Oregon, and negotiations were had for some considerable period of time, which plaintiff contends resulted in the defendant accepting the order for the 50,000 ties to be shipped from Oregon to Philadelphia via the Panama canal; that the defendant refused to fill the order, and thereupon plaintiff bought the ties in the open market at an increased cost. On the other hand, the defendant's contention is that the order for the ties was never accepted by defendant; that negotiations by the plaintiff for the purchase of the ties were carried on through defendant's Chicago agent, who had no authority to enter into binding contracts but whose only authority was to solicit, obtain and transmit orders to the home office at Portland for acceptance or

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There is no evidence to suggest that the above information is being used for any other purpose than the one stated above.

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James M. Smith, Jr., 117 S. 11th St., St. Petersburg, Fla. 33701

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25. When the animal is in the distance, move out of sight and stand still.

1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796 2797 2798 2799 2800 2801 2802 2803 2804 2805 2806 2807 2808 2809 2810 2811 2812 2813 2814 2815

not available for the study. The results of the study are presented in Table 1.

[illegible]

... ..

Source: *Journal of the American Statistical Association*, 1977, 72, 1, 1-11.

rejection; and that the order in question was never accepted by the home office.

The suit was brought on July 2, 1935, and the summons was served on the defendant by leaving a copy with defendant's Chicago agent. The defendant moved to quash the service, which motion, after hearing, was allowed and the suit dismissed. Plaintiff prosecuted an appeal to this court, where the service was held good and the judgment was reversed and the cause remanded. Phila. Rapid Trans. Co. v. Coast Pir & Cedar Prod. Co., 241 Ill. App. 320. The cause was afterwards (December 7, 1936) reinstated in the trial court. On December 17th following an order was entered that defendant file a general appearance and leave was given defendant to file a demand for a jury instanter, which was accordingly done.

The case came on for trial June 17, 1939, when plaintiff filed a written motion asking that the case be tried without a jury, on the ground that the defendant had failed to demand a jury within the time provided by section 36 of the Municipal Court act. The motion was overruled and a jury trial was had.

Plaintiff contends that the court erred in overruling its motion; that since there was a hearing in 1935 on defendant's motion to quash the service of summons, at which evidence was offered and which issue might have been the subject of a jury trial, it was too late for defendant to demand a jury after the case had been remanded from this court, because section 36 of the Municipal Court act requires that where a defendant desires a jury trial he must make such a demand in writing at the time he enters his appearance. We think this contention cannot be sustained. On the hearing of defendant's motion to quash the service, it had entered but a limited and special appearance for the sole purpose of

rejection and that the state is denied the right to regulate.

doi:10.1017/S002229240000402

How many of you have seen a "Giant" or "Titanic"?

was advised to leave a journal of research and no further was

1. The following are the names of the persons who are to be interviewed:

... ..

1990-1991, 1991-1992, 1992-1993, 1993-1994, 1994-1995, 1995-1996, 1996-1997, 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021, 2021-2022, 2022-2023, 2023-2024, 2024-2025, 2025-2026, 2026-2027, 2027-2028, 2028-2029, 2029-2030, 2030-2031, 2031-2032, 2032-2033, 2033-2034, 2034-2035, 2035-2036, 2036-2037, 2037-2038, 2038-2039, 2039-2040, 2040-2041, 2041-2042, 2042-2043, 2043-2044, 2044-2045, 2045-2046, 2046-2047, 2047-2048, 2048-2049, 2049-2050, 2050-2051, 2051-2052, 2052-2053, 2053-2054, 2054-2055, 2055-2056, 2056-2057, 2057-2058, 2058-2059, 2059-2060, 2060-2061, 2061-2062, 2062-2063, 2063-2064, 2064-2065, 2065-2066, 2066-2067, 2067-2068, 2068-2069, 2069-2070, 2070-2071, 2071-2072, 2072-2073, 2073-2074, 2074-2075, 2075-2076, 2076-2077, 2077-2078, 2078-2079, 2079-2080, 2080-2081, 2081-2082, 2082-2083, 2083-2084, 2084-2085, 2085-2086, 2086-2087, 2087-2088, 2088-2089, 2089-2090, 2090-2091, 2091-2092, 2092-2093, 2093-2094, 2094-2095, 2095-2096, 2096-2097, 2097-2098, 2098-2099, 2099-2100, 2100-2101, 2101-2102, 2102-2103, 2103-2104, 2104-2105, 2105-2106, 2106-2107, 2107-2108, 2108-2109, 2109-2110, 2110-2111, 2111-2112, 2112-2113, 2113-2114, 2114-2115, 2115-2116, 2116-2117, 2117-2118, 2118-2119, 2119-2120, 2120-2121, 2121-2122, 2122-2123, 2123-2124, 2124-2125, 2125-2126, 2126-2127, 2127-2128, 2128-2129, 2129-2130, 2130-2131, 2131-2132, 2132-2133, 2133-2134, 2134-2135, 2135-2136, 2136-2137, 2137-2138, 2138-2139, 2139-2140, 2140-2141, 2141-2142, 2142-2143, 2143-2144, 2144-2145, 2145-2146, 2146-2147, 2147-2148, 2148-2149, 2149-2150, 2150-2151, 2151-2152, 2152-2153, 2153-2154, 2154-2155, 2155-2156, 2156-2157, 2157-2158, 2158-2159, 2159-2160, 2160-2161, 2161-2162, 2162-2163, 2163-2164, 2164-2165, 2165-2166, 2166-2167, 2167-2168, 2168-2169, 2169-2170, 2170-2171, 2171-2172, 2172-2173, 2173-2174, 2174-2175, 2175-2176, 2176-2177, 2177-2178, 2178-2179, 2179-2180, 2180-2181, 2181-2182, 2182-2183, 2183-2184, 2184-2185, 2185-2186, 2186-2187, 2187-2188, 2188-2189, 2189-2190, 2190-2191, 2191-2192, 2192-2193, 2193-2194, 2194-2195, 2195-2196, 2196-2197, 2197-2198, 2198-2199, 2199-2200, 2200-2201, 2201-2202, 2202-2203, 2203-2204, 2204-2205, 2205-2206, 2206-2207, 2207-2208, 2208-2209, 2209-2210, 2210-2211, 2211-2212, 2212-2213, 2213-2214, 2214-2215, 2215-2216, 2216-2217, 2217-2218, 2218-2219, 2219-2220, 2220-2221, 2221-2222, 2222-2223, 2223-2224, 2224-2225, 2225-2226, 2226-2227, 2227-2228, 2228-2229, 2229-2230, 2230-2231, 2231-2232, 2232-2233, 2233-2234, 2234-2235, 2235-2236, 2236-2237, 2237-2238, 2238-2239, 2239-2240, 2240-2241, 2241-2242, 2242-2243, 2243-2244, 2244-2245, 2245-2246, 2246-2247, 2247-2248, 2248-2249, 2249-2250, 2250-2251, 2251-2252, 2252-2253, 2253-2254, 2254-2255, 2255-2256, 2256-2257, 2257-2258, 2258-2259, 2259-2260, 2260-2261, 2261-2262, 2262-2263, 2263-2264, 2264-2265, 2265-2266, 2266-2267, 2267-2268, 2268-2269, 2269-2270, 2270-2271, 2271-2272, 2272-2273, 2273-2274, 2274-2275, 2275-2276, 2276-2277, 2277-2278, 2278-2279, 2279-2280, 2280-2281, 2281-2282, 2282-2283, 2283-2284, 2284-2285, 2285-2286, 2286-2287, 2287-2288, 2288-2289, 2289-2290, 2290-2291, 2291-2292, 2292-2293, 2293-2294, 2294-2295, 2295-2296, 2296-2297, 2297-2298, 2298-2299, 2299-2300, 2300-2301, 2301-2302, 2302-2303, 2303-2304, 2304-2305, 2305-2306, 2306-2307, 2307-2308, 2308-2309, 2309-2310, 2310-2311, 2311-2312, 2312-2313, 2313-2314, 2314-2315, 2315-2316, 2316-2317, 2317-2318, 2318-2319, 2319-2320, 2320-2321, 2321-2322, 2322-2323, 2323-2324, 2324-2325, 2325-2326, 2326-2327, 2327-2328, 2328-2329, 2329-2330, 2330-2331, 2331-2332, 2332-2333, 2333-2334, 2334-2335, 2335-2336, 2336-2337, 2337-2338, 2338-2339, 2339-2340, 2340-2341, 2341-2342, 2342-2343, 2343-2344, 2344-2345, 2345-2346, 2346-2347, 2347-2348, 2348-2349, 2349-2350, 2350-2351, 2351-2352, 2352-2353, 2353-2354, 2354-2355, 2355-2356, 2356-2357, 2357-2358, 2358-2359, 2359-2360, 2360-2361, 2361-2362, 23

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1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 2689-2690, 2691-2692, 2693-2694, 2695-2696, 2697-2698, 2699-2700, 2701-2702, 2703-2704, 2705-2706, 2707-2708, 2709-2710, 2711-2712, 2713-2714, 2715-2716, 2717-2718, 2719-2720, 2721-2722, 2723-2724, 2725-2726, 2727-2728, 2729-2730, 2731-2732, 2733-2734, 27

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1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950, and the majority of this increase has been in urban areas. This has led to a concentration of population in a few large cities, which has in turn led to a number of problems, such as overcrowding, pollution, and traffic congestion.

DOI: 10.1002/for

CONFIDENTIAL

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There is a lot of talk about the importance of the "right" to life, liberty, and the pursuit of happiness.

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questioning the jurisdiction of the court over the defendant. Afterwards, when the case was re-docketed in the trial court, the defendant, upon entering its appearance and as a part of the same document, made its demand in writing for a jury trial. We think that section 30 of the Municipal Court act, when it speaks of the defendant demanding a jury trial when he enters his appearance, means a general and not a special appearance. Moreover, any doubt as to whether defendant was entitled to a jury trial should be resolved in its favor. This was the pronouncement of our Supreme Court in the case of Harrison Hotel Co. v. Kirsner, 246 Ill. 431, where it is said (p. 433):

"In view, however, of the provision of the constitution that the cherished right of trial by jury shall remain inviolate, the statute should be liberally construed in favor of the right and the inclination of the court should be to protect and enforce the right."

Plaintiff further contends that on plaintiff's appeal to this court from the order of the court quashing the service and dismissing the suit, it was determined by this court that Behnell, the defendant's Chicago agent, was authorized by the defendant to make the contract in suit, that this question was foreclosed, and the trial court erred in not so holding. We think it obvious that this contention is unsound. In passing on the former appeal, the only question considered was whether the service was good. Obviously the merits of the case were in no way involved.

Coming now to the merits of the controversy, as to whether there was a binding contract between the parties for the purchase and sale of the 50,000 cross ties. Considerable evidence was introduced as to whether defendant's Chicago agent had implied authority to make a binding contract on behalf of the defendant. There was also evidence tending to prove that a binding contract had been entered into between the parties as expressly authorized by the defendant through its president in Portland.

There is no sale (p. 433):

"In view, however, of the provisions of the constitution that the elected right of free speech shall be preserved, the voters should be liberally considered in favor of the right of free expression of the sentiment to be placed on the ballot and the right."

only occasion considered was whether the action was good. Certainly the motion was in no way favored.

Going now to the article of the correspondence, as in
which there was a binding contract between the parties for the
purchase and sale of the 20,000 acres tract. This article was
was introduced as to whether defendant's Chicago agent had failed
entirely to make a binding contract on behalf of his defendant.
There was also evidence tending to prove that a binding contract
had been entered into between the parties on approximately outlined
by the defendant through his witnesses in Chicago.

Upon a careful consideration of all the evidence in the record we are clear that a binding and valid contract was entered into as expressly authorized by the defendant's president, and that the verdict of the jury in favor of the defendant is contrary to the evidence. On the merits, there is little or no real conflict in the evidence, which is to the following effect:

In 1923 a Chicago office was opened in the name of the defendant, and Schnell was its representative there. In 1923 negotiations were carried on between plaintiff and defendant through its Chicago representative which resulted in the purchase by plaintiff from defendant of 75,000 cross ties. That contract was carried out by both parties and is in no way involved in this suit. On March 26, 1925, plaintiff wrote the defendant at its Chicago office, asking for prices for cross ties. At the bottom the letter contained a blank for the requested information. Upon receipt of this letter by Schnell in Chicago, he testified, he wired the home office in Portland for quotations and received a telegram in reply from defendant's president that he could not find the price defendant had obtained for the ties in 1923, but suggested that Schnell quote the same price, who then advised the home office what the price was; that thereupon Schnell filled out the blank at the bottom of plaintiff's letter of March 26th, quoting a price of \$34 a thousand, and in reply to the request as to the time of delivery said: "Can be shipped within any reasonable time, agree upon." This was signed in the name of the defendant by Schnell and returned enclosed with a letter written by Schnell to plaintiff in Philadelphia. This was on April 2, 1925. The letter stated:

"We wish to thank you for receipt of your inquiry under date of March 26, calling for quotation on 50,000 Ties. We are enclosing herewith our quotation of \$34.00 P.C.B. your wharves, Philadelphia.

"It goes without saying, that we are very desirous of securing this order and shall be more than glad to have you phone

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or wire our Chicago office for any information which you might desire."

This letter was signed in the name of defendant by Schnell. On the letterhead appeared the names of the officers of the defendant, including Miller, the president, and Schnell was named as defendant's "District Manager" in Chicago. After this letter was sent, the evidence shows, there was long distance telephoning between Chicago and Philadelphia, Schnell endeavoring to obtain the contract for defendant. Plaintiff's representative, Reize, testified that he talked a number of times over the telephone to Schnell at Chicago, and that on the 23th or 25th of April he explained to Schnell that "speed was the element in connection with taking the order, and that we must have those ties in Philadelphia by the first of July;" that Schnell said he was in doubt whether the ties could be delivered in Philadelphia at that time; that he would take the order on that basis and that the order was immediately written. The witness further testified that the next day Schnell telephoned him and said he could not have all the ties in Philadelphia by July 1st, but could ship one-third of them from Portland June 1st and two-thirds July 1st; that he told Schnell he would investigate and let him know and that later he wired Schnell accepting this proposition. Thereupon Reize mailed a written confirmation of the acceptance to the defendant at Chicago. Afterwards on the same day Schnell at Chicago telegraphed the defendant at Portland:

"Landed order of thirty-four dollars - must be in Philadelphia July first. Price must stand this final but might be able to get a reasonable change in delivery dates advised at once."

This telegram was received at Portland April 25th at 11:55 a. m. Schnell testified that after midnight April 25th he called the Portland office and discussed the matter with Miller, defendant's president; that Miller said it would be impossible to ship all the ties by July 1st; witness replied it was a big order;

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

This policy was signed by the President of the United States, and it was a policy of non-interference in the internal affairs of other countries. It was a policy of respect for the sovereignty of other nations, and it was a policy of peace and good will. It was a policy that was based on the principles of justice and fairness, and it was a policy that was based on the interests of the American people. It was a policy that was based on the values of democracy and freedom, and it was a policy that was based on the ideals of the American Revolution. It was a policy that was based on the principles of the Declaration of Independence, and it was a policy that was based on the values of the American people. It was a policy that was based on the interests of the American people, and it was a policy that was based on the values of the American people. It was a policy that was based on the principles of the Declaration of Independence, and it was a policy that was based on the values of the American people. It was a policy that was based on the interests of the American people, and it was a policy that was based on the values of the American people.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation. Finally, the last step in the process is to evaluate the results of the implementation. This involves determining whether the problem has been solved and whether the resources have been used effectively.

[illegible]

that Miller stated that they could have part of the ties by June 1st and the balance by July 1st. He further testified that after this conversation Miller wired plaintiff that he would accept the order, one-third shipment on June 1st and two-thirds on July 1st; that after talking with plaintiff's representative in Philadelphia he wired or talked to the home office at Portland, "telling them that I had secured the order on those terms." Plaintiff's representative, Baize, further testified that in these telephone talks with Schnell, "I told them that we had to have those ties during the weather in which we could lay tracks." April 28th Schnell wired plaintiff, "Confirming 'phone conversation we are accepting your order thirty four dollars *** one third June first and complete July first *** Wired our home office Tuesday night that you had awarded us the business therefore hope nothing interferes and above proves acceptable." This telegram was signed in the name of the defendant. On the next day plaintiff replied: "Telegram 28th Delivery satisfactory proceed with order." This wire was forwarded by mail by Schnell to Portland and received there May 4th. The evidence further shows that on April 28th Schnell sent a formal written acceptance of the order to plaintiff, in which it was stated: "(Confirming wire) 1/3 June 1st 1935
2/3 July 1st 1935. Will complete
sooner if possible. Invoice and bill of lading
will be forwarded by our Portland office."

On May 5th defendant wired from Portland to Chicago to ascertain from plaintiff if there would be the same inspectors as those who acted in connection with the order of 1923, and for Schnell to have an understanding with plaintiff that the ties were to be removed from the lighters in Philadelphia within three days. On the same day Schnell wired Philadelphia concerning the inspectors. May 14th plaintiff wrote defendant at Chicago naming inspectors. May 19th defendant from Portland wired Philadelphia that it had

[illegible]

made arrangements to load the entire 50,000 ties so that they would leave by boat on June 20th and arrive in Philadelphia July 24th; that

"This quickest time can make as other steamers loading earlier June make other ports before Philadelphia *** Please wire approval."

This wire was received in Philadelphia on Saturday, May 16th, and the following Monday plaintiff wired Portland:

"Entire shipment arriving Philadelphia July 26 not satisfactory. Must have at least one third Philadelphia July 1st as arranged with your representative."

On the same day Portland wired Philadelphia that it could have the ties cut in time "but matter transportation entirely quickest dispatch possible;" that defendant must close with the transportation line for the space immediately; that there was no other boat available; that

"If you do not want us to avail ourselves of this space which would get all ties in Philadelphia July 20th to 24th advise and we will consider order cancelled."

On the next day Portland again wired plaintiff:

"Not hearing from you will release space we have option on and consider entire transaction cancelled. Did best we could for you get ties in Philadelphia quickest time possible;" that no other concern could deliver the ties in any shorter time, and "not hearing tomorrow before noon will consider deal off."

May 20th Philadelphia wired Portland: "Our needs for July 1st absolutely imperative track construction season will not wait as you well know," and advising that unless the ties were delivered defendant would be held for loss. May 21st Portland wired Philadelphia: "Right letter received all orders submitted by eastern salesman subject approval home office order has never been formally accepted by this office therefore no contract exists between us impossible to get ties Philadelphia July first were it possible we would be only too glad to do so still get space today *** not hearing from you however today will defi-

made arrangements to load the cargo 20,000 tons on each day
would leave by boat on June 20th and arrive in Philadelphia July
19th; this

"This calendar also can make an other calendar looking earlier
and make other parts better Philadelphia -- please also up-
grade."

This wire was received in Philadelphia on Saturday, May 14th, and
was received from Philadelphia dated Tuesday.

"The calendar writing Philadelphia will be made earlier
and. These have at least one other Philadelphia July 1st as
early as your representative."

On the same day Philadelphia dated Philadelphia that it would have the
time at 11:00 AM and would be ready to receive visitors.

Philadelphia dated: "The calendar will also be the Philadelphia
also time for the same immediately; that there can be a new book
available; this

"It was to be that we will deliver at the same time
would get all the in Philadelphia July 1st to the office
and we will consider other possibilities."

On the same day Philadelphia dated Philadelphia:
"The calendar from you will deliver when we have again on and
calendar writing Philadelphia. This book we will be
you get time in Philadelphia and the time in my office
that we also consider would deliver the time in my office
this and the calendar writing from you will deliver this
July 1st

July 1st, Philadelphia dated Tuesday: "The calendar from
July 1st immediately deliver from Philadelphia when will and
will as you well know," and deliver from you will be
delivered calendar would be ready for June. The first calendar
also Philadelphia: "The calendar would be ready for June
by certain calendar subject approved from all the other and from
from Philadelphia dated by this office calendar to calendar
calendar from you will be ready for June 1st and the first
and it possible we would be only the time to be an office and
calendar from you will deliver from you will deliver this July 1st

nately release space and take our chances with you in court." On the same day plaintiff wired other parties endeavoring to obtain the ties. On May 23rd Portland wired Philadelphia: "Finding it impossible to comply with delivery conditions you ask we are hereby declining order you offered us for ties through our Chicago salesman *** found it impossible to accept order and hope you have no trouble securing elsewhere we did beat we could in way of lining up transportation and regret it did not meet with your approval."

Plaintiff also put in evidence to the effect that it was required to pay more for the ties which it obtained from other parties than if defendant had carried out the contract, the total excess being \$7510.51. This sum was made up on account of the ties being transported by rail instead of boat.

The defendant offered evidence to the effect that the agreement between it and Schnell, its Chicago agent, was that Schnell's authority was to solicit orders; that he had no authority to accept or reject them, but that upon obtaining an order his authority was to submit it to the Portland office for acceptance or rejection. This agreement between defendant and its agent appears to have been oral.

From a consideration of the evidence, which we have set forth rather fully, we think it clear that whether Schnell was authorized under his contract of employment with the defendant to enter into binding contracts for the defendant, is immaterial because the evidence shows without dispute that the order in question was submitted by Schnell to the home office and he was expressly authorized to enter into the contract with plaintiff for the purchase of the ties. As soon as Schnell received the request for bids from plaintiff, he immediately took the matter up with the home office at Portland and the uncontradicted evidence shows

that throughout the negotiations which extended over a period of some weeks, Schnell advised the home office of the situation at all times and he was expressly authorized to accept the order of \$34 per thousand F. O. B. wharves, Philadelphia, "1/3rd June 1st, 1935, and 2/3rds July 1st, 1935."

It appears that defendant in good faith was endeavoring to fulfill the contract but was unable to do so on account of its inability to obtain space for shipping the tiles so that they would reach Philadelphia within the time agreed upon. The question of Schnell's implied authority to bind defendant should not have been submitted to the jury at all. It was not in the case.

At the close of all the evidence plaintiff and defendant each made a motion for a directed verdict in its favor. The motions were overruled and plaintiff contends that this was error and that this court should set aside the verdict and judgment and enter judgment in this court in favor of plaintiff for \$7510.31. In support of this the case of Mirich v. Faresman Contracting Co., 312 Ill. 343, and other authorities are cited. Even if we were of the opinion that on the merits plaintiff was entitled to recover and should have a verdict directed in its favor on that point, we think we would not be warranted, under the law, in entering judgment here. The case was being tried before the jury and either party was entitled, we think, under the statute (Unhill, sec. 39, ch. 110) to have the jury assess the damages. Favlich v. Gladich, 311 Ill. 149.

We think we ought to say that the evidence taken on the hearing of the motion to quash the summons ought not to have been made a part of the record in this appeal, as was done. It only tends to confusion and to greatly increase the work in this court.

A number of exhibits are in the record which were introduced on the former hearing and are in the bill of exceptions

that throughout the examination which extended over a period of
 some weeks, counsel advised the same office of the situation of all
 cases and he was expressly authorized to accept the order of the
 New Hampshire State Bar Association, New Hampshire Bar Association,
 and State Bar Association.

It appears that defendant is good faith and honest
 in his efforts to fulfill the contract but was unable to do so as a result of
 the inability to obtain access for shipping the same as they were
 would require Philadelphia within the time agreed upon. The question
 of defendant's liability in this respect remains and has
 been submitted to the jury at all. It was not in the case.

At the close of all the evidence plaintiff and defendant
 each made a motion for a directed verdict in its favor. The motion
 were overruled and liability remains that this was proper and that
 this court should not make the verdict and judgment and entry of
 judgment in favor of plaintiff for \$7500.00. It is requested
 at this time that the case of WILLIAM E. FARMER ET AL. vs. THE
NEW HAMPSHIRE STATE BAR ASSOCIATION, ET AL. be set aside. Even so we want of law
 and other questions are also. Even so we want of law
 remains that on the merits plaintiff was entitled to recover and
 should have a verdict directed in its favor on that point, so that
 we would not be warranted, under the law, in entering judgment there.
 The case was being tried before the jury and almost every one of
 them, we think, under the statute (chapter 201, sec. 100) to
 have the jury return the verdict. WILLIAM E. FARMER, ET AL. vs. THE
NEW HAMPSHIRE STATE BAR ASSOCIATION, ET AL.
 We think we ought to say that the agreement between the
 parties at the motion to grant the motion which was to have been
 made a part of the record is this agreement, as was shown, to say
 bonds to satisfaction and to greatly improve the work in this court.
 A number of exhibits are in the record which were
 introduced on the former hearing and are in the bill of exceptions

filed on that hearing. Most of them were re-introduced on the trial on the merits and are in the bill of exceptions, the proper place for them. Some of them are abstracted where they appear in the record made on the motion to quash, and when we come to the proper place where they were introduced on the hearing, the abstract refers back to the former place where they may be found.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

McBride, P. J., and Hatchett, J., concur.

the fact is the former place where they may be found.

The judgment of the National Endowment for the Humanities

[illegible]

1990-1991 0.65 0.65

... ..

VAL LOMERAD, Doing Business as
VAL SHEET METAL WORKS,
Appellee,

vs.

JOHN A. TAFT et al.,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal certain defendants seek to reverse an order of the Municipal court of Chicago refusing to vacate and set aside a judgment entered against them.

The record discloses that on February 13, 1926, plaintiff brought suit against James H. Taft, John A. Taft, Sr., John A. Taft, Jr., James E. Taft, Robert E. Taft, James H. Taft & Son, Anakin Company, Dr. Pierce Chemical Company and Natural Resources. Plaintiff's claim, as set up in its statement of claim, was for \$440.80, claimed to be due it for work, labor and materials furnished by it to the defendants. February 27 a written appearance of the following defendants was entered by their attorneys, Klass and Porter: John H. Taft sued as John H. Taft, Sr.; John A. Taft sued as John A. Taft, Jr.; Anakin Company, a corporation; John H. Taft, John A. Taft, Adrian E. Ailes, doing business as Dr. Pierre Chemical Company, and Natural Resources Exploration Company, a corporation, sued as National Resources Exploration Company. In the same day another written appearance was entered for the defendants James H. Taft and James E. Taft, by their attorney, Grace H. Harte.

On February 28 the defendants represented by Klass and Porter filed an affidavit of merits in which they set up that they had a good defense to the whole of plaintiff's claim, viz: that at no time had plaintiff done any work or furnished any material for the defendants and that such defendants had never had any business dealings with plaintiff.

On March 7 an affidavit of merits was filed by the

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defendants James H. and James E. Taft, in which it was set up that at no time had plaintiff done any work or furnished any material to the defendant, James E. Taft; that he owed nothing to plaintiff; that the defendant, James E. Taft, doing business as BuBarry Company, did order from plaintiff 1,000 signs at an agreed price of fifty cents each; that 200 of the signs were delivered for which James E. Taft paid \$100 to plaintiff; that the balance of the signs, viz, 800 were not delivered and that he did not owe plaintiff any sum.

The record discloses that on April 12, 1929, the cause came on for hearing in regular course, the defendants not appearing. The court heard the evidence, found the issues for the plaintiff and against the defendants, and entered judgment for the amount of plaintiff's claim, \$440.80.

Thirty-eight days thereafter, May 20, certain of the defendants filed a verified petition, supported by affidavits, and moved the court to vacate and set aside the judgment. The motion was overruled and this appeal followed.

The substance of the petition was that after the appearance of the defendants and the filing of their affidavits of merits above set forth, one of the defendants, Robert Taft, not having been served and the suit not having been dismissed as to him, and before the hearing of the cause on April 12, Attorney Harte called on the attorneys for the other defendants and stated to them that their clients were absolutely blameless and should not have been sued; that by reason thereof, Attorney Harte would watch the call of the calendar of the Municipal court and advise attorneys Glass and Porter when the case would be tried; that in accordance with the agreement, Attorney Harte examined the files of the case and noticed that one of the defendants had not been served and that no date had been set for the trial. Thereupon she asked the clerk of

the court when the case would be set for trial and he stated to her that it would not be set for trial until all the defendants were served, and that Attorney Harte "would be served with notice as to the time of the trial;" that attorneys Klass and Porter in reliance upon Attorney Harte did not prepare for trial and knew nothing whatever about any judgment entered in the case until they were notified on May 15 that a garnishment proceeding had been instituted predicated upon the ex parte judgment of April 12; that there was no warrant for the garnishment proceeding because the affidavit for the garnishee summons, which set up that none of the defendants had any assets subject to levy, was false; that none of the defendants represented by Klass and Porter had any connection with the subject matter of the suit but that certain goods were ordered from plaintiff by the defendant James E. Taft on his own responsibility; that plaintiff knew this fact but brought suit against all of the defendants for the purpose of forcing a settlement or securing a snap judgment.

Grace E. Harte made an affidavit in support of the petition, in which it is alleged that she represented the defendants James E. and James H. Taft; that if any of the defendants were liable, it was James E. Taft alone; that after she filed the appearance of her clients and affidavit of merits, she examined the files of the case and upon seeing that one of the defendants was not served and no date set for the trial, "she inquired of the minute clerk what the trial date would be and was by him informed that the case would be continued until the defendant not served would be served and that she would be notified;" that thereupon she notified Attorney Klass that she would watch the case and inform him when it would be called for trial.

An affidavit was filed by Porter and one by Klass.

Porter in his affidavit set up that he went to the clerk of the

the court when the case would be set for trial and be ready to
try; that it would not be set for trial until all the defendants
were served, and that Attorney Korte "would be served with notice
as to the time of the trial;" that afterwards Korte and Korte in
reliance upon Attorney Korte did not prepare for trial and when
nothing whatever about any judgment entered in the case would have
very notified on May 15 that a judgment concerning had been
indicated entered upon the court's docket on April 15;
that there was no warrant for the Government proceeding because
the affidavit for the Government's summons, which was not made
of the defendant and any motion subject to levy, was taken; that
none of the defendants represented by Korte and Korte had any
communication with the subject matter of the suit but that certain
facts were stated from affidavits by the defendant's counsel, that
in his own responsibility; that defendant's counsel was not
duly notified of any of the defendants for the purpose of
furnishing a statement or executing a search warrant.
Grace A. Korte made an affidavit in support of the
petition, in which it is alleged that she represented the de-
fendants James H. and James H. Korte; that if any of the defendants
were liable, it was James H. Korte alone; that after she filed the
petition of her affidavit and affidavit of Korte, she abandoned
the trial of the case and upon seeing that one of the defendants
was not served and no date set for the trial, "she abandoned the
minute clerk what the trial date would be and was by him informed
that the case would be continued until the defendant was served
would be served and that case would be notified;" that afterwards
the notified Attorney Korte and she would return the case and in-
form him when it would be called for trial.
An affidavit was filed by the two and one of Korte
before in his affidavit and he was not to the effect of the

Municipal court to ascertain when the case was set for trial, but was informed by a deputy clerk that the files were not available, and that thereafter Attorney Harte promised to inform him of the date of the call of the case for trial. We think it unnecessary to state anything set up in the affidavit filed by Klass.

From the petition and affidavits it appears that after the two affidavits of merits were filed Attorney Harte examined the files and ascertained that one of the named defendants was not served and was informed by the minute clerk that no date had been set for trial; that it would not be set until the defendant not served had been served, and that when this was done Attorney Harte would be notified of the date of the trial. We think this was entirely insufficient to show any diligence on the part of counsel representing any of the defendants. Just who was to notify Attorney Harte when the case was to be set for trial does not appear. It is obvious that the minute clerk, with all his duties in the Municipal court, would not be able to do so. It is also clear that it was the duty of counsel to watch the call of the courts. If it were otherwise, no judgment entered could be considered final.

The order of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

judicial court is essential when the court was not the trial, the
was informed by a deputy clerk that the trial was not available,
and that the trial was postponed to a later date at the
date of the trial of the case for trial. We think it unnecessary
to state anything as to the evidence filed by the State.

From the position and attitude of the State it appears that after
the trial was postponed to a later date the State was not

trial was postponed to a later date of the case for trial. We think it
unnecessary to state anything as to the evidence filed by the State.
The trial was postponed to a later date of the case for trial. We think it
unnecessary to state anything as to the evidence filed by the State.

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unnecessary to state anything as to the evidence filed by the State.

33889

MARIA A. SPAIN, Executrix and
Trustee under and by virtue
of the Last Will and Testament
of Patrick J. Renn, Deceased,
Appellant,
(Patrick J. Renn, Deceased,
Complainant Below);

vs.

BRIGID RENN, Individually and as
Administratrix of the Estate of
James J. Renn, Deceased, MARY T.
MOLLOHAN, CATHERINE E. RENN, JOHN
G. RENN, AGNES C. RENN and HELENA
F. RENN,

Appellees,
(Defendants Below).

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

257 I.A. 639

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On April 29, 1927, Patrick J. Renn filed his bill of complaint against Brigid Renn individually and as administratrix of the estate of James J. Renn, deceased. The children of Brigid and James J. Renn, the deceased, were also made parties defendant. The bill prayed that an accounting be had between the parties. After the issues were made up the cause was referred to a Master in Chancery to take the proofs and make up his report as to whether there should be an accounting. The master heard the evidence, which was voluminous, made up his report, found that the complainant held certain personal property belonging to the partnership involved, which he should account for to the defendants, and recommended that the prayer of the bill for an accounting be denied. Complainant filed objections to the report and the master filed a supplemental report making substantially the same findings and the same recommendations. On the coming in of the report the objections were ordered to stand as exceptions and after hearing they were overruled. The master's findings as to the transactions of the partnership occurring up to the time of the death of James J. Renn, deceased, were in all things approved, and as to those matters occurring

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THE ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C. 20540
JANUARY 1, 1964
MEMORANDUM FOR THE ATTORNEY GENERAL
SUBJECT: [Illegible]

WILLIAM H. HARRIS, JR.,
Ministry of the Interior,
Washington, D. C.
JANUARY 1, 1900

1. 1990年1月1日以前

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

On April 26, 1957, Inspector G. John Tilton, at 1111 N.

7. The estate of James T. Horn, deceased. The will was of date

of these I found, in general, were also within the

will state that we had no idea where the bodies were.

1957 The larvae were reared on the same diet as the adults.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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and the following information should be furnished:

and a review of the Bill for an amendment be made.

1144 objections to the report and the matter will be considered.

work being substantially the same thing as the work being

...in the evening in all the reports the observations were

There are two other things that are important to know about the company. First, the company is a public company, which means that it is listed on the New York Stock Exchange. Second, the company is a member of the S&P 500, which is a list of the 500 largest companies in the United States.

gibbering and to amusement and to an agonizing

...and up to the time of the death of James H. ...

THE UNIVERSITY OF CHICAGO PRESS

subsequent to the death of James J. Henn the finding of the master was disapproved and it was decreed that the cause be again referred to the master to state the account as prayed for in the cross-bill filed by the defendants after the master had made up his report, and it is to reverse this decree that the complainant appeals.

So far as it is necessary to state the facts, the record discloses that in 1896 the complainant, Patrick J. Henn, and his brother James J. Henn, entered into a partnership which engaged in the plumbing business in Chicago. They continued in this business until James died June 21, 1926. During the entire period, about thirty years, the relations were amicable in every particular. The master found, and it is conceded by both parties to this controversy, that throughout the entire partnership there was a close brotherly relation existing between the partners. After the death of James some controversy arose between the complainant and the defendant, James's widow. At the time James died and for some few years prior thereto, the business of the partnership had increased considerably. The principal work during this period was the construction, by the partnership, of underground work in the streets of Chicago, for the City. Some contracts of this character were unfinished at the time James died and the work was continued and the contracts completed.

In 1896, when the partnership was formed, both brothers were bachelors; about 1900 James married and raised a family; Patrick, who was several years older than James, remained a bachelor. After the argument of the cause before the chancellor on the master's report, Patrick died and his executrix and trustee was substituted as complainant in his stead.

Patrick's contentions, as stated in his bill, were that there had ^{never} been an accounting, though on a number of occasions he had

...to the fact of James L. ... the ...
... and it was ... that the ...
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... that in 1900 the ...
... James L. ... into a ...
... in Chicago. They ...
... until James ... 1900. During the ...
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requested his brother James for an accounting but that James had from time to time put the matter off. There was no charge of fraud or misrepresentation of any kind in the bill, nor was there any evidence offered tending to sustain any such contention, nor is there any argument made in this court that there was any act of dishonesty on the part of James.

The evidence further shows that the partnership from time to time, and especially during the later years, made investments from the profits derived from the partnership business both in real estate and personal property, and the evidence is - and it is conceded by both parties - that each partner had an equal interest in the business and each partner at all times knew all of the transactions that the partnership conducted and the investments made. There was no concealment or unfair dealing in any particular. The evidence is voluminous, the record containing more than 1600 pages, and an examination of the master's report and supplemental report discloses the fact that he went into the questions involved with a great deal of care. He found that all of the real estate had been equally divided between the partners but that there was certain personal property that the complainant Patrick should account for and that it should be divided equally between him and the defendants.

The master made his report July 12, 1928, and his supplemental report November 1 of the same year. On February 3, 1929, the defendants filed a cross-bill. The cross-bill was not referred to the master. By it the cross-defendants sought to obtain an accounting not only of these specific items of personal property which the master found the complainant Patrick had not accounted for, but also an accounting of the transactions that took place after the death of James. It was decreed by the chancellor that there should be an accounting as prayed for in the cross-bill, and it was ordered that the cause be referred to the master to state such unsettled

presented his report for an accounting and that there had
been time to time for the matter all. There was no change of time
or representation of any kind in the bill, nor was there any
evidence offered tending to establish any such contention, nor is
there any argument made in this court that there was any act of
fraud on the part of Jones.

The evidence further shows that the partnership began
in 1912, and especially during the later years, made investments
from the profits derived from the partnership business both in real
estate and personal property, and the evidence is - and it is
undisputed by both parties - that each partner had an equal interest
in the business and each partner at all times knew all of the trans-
actions that the partnership conducted and the investments made.
There was no concealment or unfair dealing in any particular. The
evidence is voluminous, the record containing more than 1000 pages,
and an examination of the master's report and supplemental report
discloses the fact that he went into the questions involved with a
view to get out of the partnership all of the real estate and personal
property divided between the partners and that there was certain
personal property that the partnership should account for
and that it should be divided equally between him and the partnership.
The master made his report July 10, 1924, and his sup-
plemental report November 1 of the same year. On February 3, 1925,
the defendants filed a cross-bill. The cross-bill was not returned
by the master. By it the cross-defendants sought to obtain an ac-
counting not only of those specific items of personal property which
the master found the complainant partner had not accounted for, but
also an accounting of the partnership from that time when the
partnership began. It was stated by the complainant that it should
be an accounting as prayed for in the cross-bill, and it was ordered
that the master be retained to the master to make such accounting.

partnership matters.

The complainant and cross-defendant prosecutes this appeal and in support of it has filed a brief of 160 pages, 138 of which apparently are devoted to a statement of the case, most of which, however, contains but a copy of the pleadings, the master's report, and the objections to the report. It is very difficult for us to ascertain just what objections are made to the decree, but apparently one of the objections urged is that the master went into the case at large on the hearing while he should have confined the hearing to determining whether or not an accounting should be had, as the order of reference provided. In the bill the complainant prayed for an accounting and we have been unable to find any contention in the brief that objection was made during the hearing before the master that he was going into the evidence on the merits and that he should confine the hearing to the question of whether there should be an accounting. In this view obviously the complainant is in no position to say that the hearing was improper. But in any event, we are of the opinion that the hearing was not improper. While the evidence was gone into in considerable detail, we think this was necessary to enable the master to reach a correct conclusion as to whether an accounting should be had. It is not contended, as we understand the argument of counsel, that the finding of the master was not warranted by the evidence, nor that his finding is against the manifest weight of the evidence. But an examination of the record leads us to the conclusion that the evidence fully warranted the finding of the master and the decree of the court.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

THE COURT: Now, the first question is, whether the evidence is sufficient to establish the fact that the defendant was present at the time of the commission of the crime. The evidence is that the defendant was seen by the witness at the time of the commission of the crime. The witness is a credible witness, and his testimony is corroborated by the other evidence. Therefore, the evidence is sufficient to establish the fact that the defendant was present at the time of the commission of the crime.

33770

FRANK A. SMILA, Administrator
Estate of Leonard Smila
Deceased, Appellee.

vs.

CITY OF BLUE ISLAND, ILLINOIS, a
Municipal Corporation, and
CHARLES J. GEMEINHARDT.

CITY OF BLUE ISLAND, ILLINOIS,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

257 L. 538

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action to recover damages for the wrongful death of Leonard Smila against the City of Blue Island, Charles J. Gemeinhardt and George Logut. The suit was dismissed as to Logut, and after trial there was a verdict and judgment in plaintiff's favor and against the two remaining defendants for \$3,000. The City of Blue Island alone prosecutes this appeal.

The record discloses that about noon on Saturday, October 9, 1926, the defendant Gemeinhardt, who was engaged in the house moving business, drove his truck or wagon on the parkway located on the north side of Orange street between Verde and Seneca streets in the city of Blue Island. The truck was loaded with three large timbers used in moving houses; two of these were 12" x 12" and 54 feet long and one 10" x 12" and 34 feet long. Gemeinhardt was unable to proceed beyond the City of Blue Island, his destination, on account of the condition of some roads just beyond Blue Island, so parked his truck on the parkway, as stated. The parkway extended from the curb to the sidewalk.

The evidence tends to show that on Saturday afternoon shortly after the timbers had been placed as stated, several small children were seen climbing up on the timbers and this also

occurred on the following day, Sunday; that about three o'clock Sunday afternoon the deceased, Leonard Leslewski, a child eight years old, was seen playing on the timbers with other children. His mother and some other parties called to him, but about that time one of the timbers rolled off the truck and struck and so injured Leonard that he died. There is further evidence to the effect that on Saturday afternoon Leonard's father, when he discovered the timbers on the truck in the parkway, called the attention of a policeman employed by the City of Blue Island to the fact, stating that children might be injured on account of the timber. It appears that the two long timbers rested on the truck at one end and the other end on timbers laid as a crib and the third was placed on the top of these two, and that the latter timber was the one that fell and fatally injured the deceased. The deceased's father further testified that when he spoke to the policeman about the danger, the latter said he would see about it and report it. There is no evidence that the policeman reported the matter to the city officials, although he was called as a witness on behalf of the plaintiff, and testified. He was not asked whether or not he had reported to the city officials.

The City of Blue Island contends that the judgment is wrong and should be reversed because the action would not lie against it and the defendant Gemeinhardt; that there was a misjoinder of causes of action. In support of this counsel for the City cites a case from Pennsylvania, and from Ohio and one from Ontario. We think none of these cases announces the law in accordance with the Supreme Court of this state. Counsel also cites City of Peoria v. Simpson, 110 Ill. 294. We think that case is in point. In that case the court, in discussing the question now under consideration said (p.301) "Where the injury is the result of a neglect to perform a common duty resting on two or more persons, although there may be no concert of

action between them," a joint action would lie; and continuing the court said: "In such cases the party injured may have his election to sue all parties owing the common duty, or each separately, treating the liability as joint or separate." In the instant case it was the duty of the City to use reasonable diligence to see that its streets and sidewalks were reasonably safe for persons who might use them. And it was the duty of the defendant Gmeinhardt to use reasonable care to see that the streets and sidewalks of the City were kept reasonably safe so far as his property was concerned. It was a common duty resting on both the City and Gmeinhardt, and therefore they were properly joined as defendants. Many cases have been adjudicated in this state which were brought against abutting property owners of the city on account of injuries sustained by reason of defective sidewalks. Gears v. City of Chicago, 161 Ill. App. 461; Loyd v. City of East St. Louis, 235 Ill. App. 353.

A further point is made that since the City of Blue Island filed a special plea in which it averred that it did not own or have any interest in the parkway on which the truck was placed, plaintiff was required to make proof that the parkway was owned and controlled by the City, and that it failed to do so. There is no semblance of merit to this point. Just why counsel for the City of Blue Island thought it was necessary to make such a defense we are unable to understand. The evidence shows without dispute that the street in question had been open for some twenty odd years. The sidewalk is in the street; the parkway in question is outside the sidewalk, between it and the curb. In cases of this kind the time of the trial court and this court ought not to be taken up in proving a fact about which there is no dispute and could be none.

Photographs of the part of the street in question are in the record and there is testimony to the effect that these

photographs correctly represent the situation. Counsel for the City of Blue Island contends that they were improperly admitted over his objection. This contention is apparently on the theory that a photographer should have been called. Obviously there is no merit in this point. Anyone who knew of the conditions was competent to give testimony as to whether the photographs correctly represented the place in question.

Before the City could be held liable under the facts in the instant case, it is the law, as contended for by its counsel, that the City must have had actual or constructive notice of the dangerous situation brought about by the truck and timbers in the parkway.

We have carefully considered all the evidence in the record and are of the opinion that the evidence was insufficient in this respect. There is no evidence that any proper city official was apprized of the fact that the timbers and truck were in the parkway. The police officer to whom the deceased's father claimed he complained of the dangerous condition, was not asked whether he reported the complaint and the situation to any official; nor is there any evidence to the effect that it was part of the policeman's duty to report such conditions. So there was no evidence of direct notice. Nor do we think the danger from the timbers, located as they were, was so obvious that the City ought to be presumed to have notice of the fact, especially when we consider the fact that the timbers were in the street but little more than 24 hours.

Since the evidence fails to show notice to the City of Blue Island, the judgment of the Circuit Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Hatchett, J., concur.

Photographs showing the condition of the ship and the crew. The ship is a small motor launch, and the crew consists of a few men. The ship is in the water, and the crew is on the deck. The ship is a small motor launch, and the crew consists of a few men. The ship is in the water, and the crew is on the deck.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive group. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive group.

We have carefully considered the report of the Committee on the subject of the proposed amendment to the Constitution of the United States, and we are of the opinion that the proposed amendment is not necessary. There is no evidence that any person will be injured by the proposed amendment, and it is not necessary to amend the Constitution at this time. The proposed amendment is not necessary, and it is not necessary to amend the Constitution at this time.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of the investigation into the activities of the British Security Organisation (BSO) in the United Kingdom.

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34056

GEO. B. LEAVITT COMPANY, a
Corporation,

Appellee,

vs.

NOVELTY SHOE COMPANY, a
Corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 I.A. 639²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$1829.37, which it claimed as a balance due it from defendant for shoes sold and delivered by it to the defendant. There was a jury trial and a verdict and judgment in plaintiff's favor for the amount of its claim and the defendant appeals. On December 30, 1927, plaintiff filed its statement of claim and on January 27, 1928, the defendant filed its affidavit of merits denying that it was indebted to the plaintiff in any sum. The case went to trial on October 15, 1929, and two days thereafter, while the case was still on hearing, the defendant was given leave to file an amended statement of claim instante, which was accordingly done. In the amended statement plaintiff's claim was for the same amount as in the original statement of claim, \$1829.37. The defendant filed an amended affidavit of merits in which it admitted a liability of \$16.67. At the close of the trial the defendant admitted that there was a balance due from it to plaintiff of \$150.60.

The record discloses that plaintiff was engaged in the manufacture of shoes at Farmington, N. H., and defendant was engaged in selling shoes in Chicago. Plaintiff had sold shoes to the defendant for about one year prior to April, 1927, and on April 14, 1927, the parties entered into a written contract whereby plaintiff agreed to sell and defendant agreed to buy 50 cases of shoes, 50 cases at \$3.00 a pair and 30 cases at \$2.00 a pair, which were to be delivered

by May 15, 1927. The first shipment of shoes, however, was not made by plaintiff until May 25th, and by the last of May plaintiff had shipped 16 cases. Further shipments were made on June 1st, 2nd and 3rd, and the last of the shoes were shipped June 4, 1927. The defendant accepted all the shoes but contends that on account of the shoes not being delivered within the time specified in the contract, it had the right to recoup its losses because it was compelled to sell the shoes at lower prices than it would have obtained for them had they been shipped according to the contract; that under the evidence it is entitled to recoup its damages on two theories: (1) because on June 1, 1927, which was before most of the shoes had been shipped, it wrote plaintiff that it would make a claim for its damages on account of plaintiff's delay in shipping the shoes; that it would pay for all shoes shipped prior to June 1st without making any such claim, but it would claim its damages on all shoes shipped after that date; and (2) that about June 20th or 21st, 1927, a representative of defendant met a representative of plaintiff in Boston and that defendant's representative there stated that defendant was going to return the shoes shipped after June 1st, but was requested by plaintiff's representative not to do so as the latter was coming to Chicago, where they would further consider the matter; that about a week thereafter plaintiff's representative called at defendant's place of business in Chicago and it was mutually agreed that defendant would keep the shoes and plaintiff would stand the loss suffered by the defendant on account of the late delivery of the shoes. It appears from the record that plaintiff set up in its statement of claim that it had received defendant's letter of June 1st, in which defendant said:

"We must ask you to help us out in disposing of Lot #8158 and #8159, on account of late delivery. According to our records you still owe us ten cases on Lot #8158 and twenty-six cases on Lot #8159, and inasmuch as it is getting pretty late for this type of merchandise, it will be almost impossible for us to dispose of these shoes.*** Trusting you will give this matter your prompt attention, we are," etc.

by May 18, 1937. The first shipment of shoes, however, was not made
by plaintiff until May 22nd, and by the last of May plaintiff had
shipped in excess. Further shipments were made on June 1st, 2nd and
3rd, and the last of the shoes were shipped June 4, 1937. The de-
fendant accepted all the shoes but contends that on account of the
shoes not being delivered within the time specified in the contract,
it had the right to rescind its license because it was represented as well
the shoes as lower prices than it would have obtained for them had
they been shipped promptly in the contract; that before the defendant
it is entitled to rescind the license on two theories: (1) because on
June 1, 1937, when was before said of the shoes had been shipped, it
was plaintiff that it would have a right for the license on account
of plaintiff's delay in shipping the shoes; that it would not for all
these shoes before it June 1st without making any more sales, but
it would claim the license on all shoes shipped after that date and
it lost about June 20th or 21st, 1937. A representative of defendant
and a representative of plaintiff in London and that defendant's rep-
resentative there stated that defendant was going to return the shoes
shipped after June 1st, but was repudiated by plaintiff's representa-
tive not to do so and the latter was heard in London, when they
said further consider the matter; that about a week thereafter plain-
tiff's representative called at defendant's place of business in Lon-
don and in the evening after that plaintiff wrote that the shoes
and plaintiff would stand the loss suffered by the defendant on ac-
count of the late delivery of the shoes. It appears that the contract
was plaintiff and so in the contract of June 1st it had provided
defendant's letter of June 1st, in which defendant said:

"We must ask you to help us out in shipment of the shoes and
license on account of late delivery. According to our contract you
will not be in a position to ship shoes and defendant's letter on June
1st, and defendant as it is stated in the contract that it had provided
plaintiff, it will be almost impossible for us to dispose of these
shoes and therefore you will give this matter your prompt attention."
- 10 -

The statement of claim also sets up plaintiff's letter in reply, dated June 7th, in which it was stated:

"On my return this morning I found your letter of June 1st., in re #8158 & 59, if you will recall this pattern was worked out with Bernard in Chicago especially for you, and was not shown in the line and the pattern as worked out called for dies on the saddle with which we had quite a little difficulty and caused a lot of delay in getting right, this of course you probably don't care about, and was the real cause of delay.*** At the price which you own them \$2.00 and \$3.00 you should have no difficulty in disposing of them. These shoes were all shipped last week and were the last delivery hardly more than two weeks after specified time and was as soon as materials and dies would allow which is in accord with acknowledgment which read May 15th, or as soon after as possible. If I hadn't personally seen a lot of these shoes and knew that they were very well made I might feel different about it."

There are a great many other details of the account in plaintiff's statement of claim, and we think we ought to state that we do not approve of this method of pleading. The evidence should be left for the trial.

There was no further correspondence or communication between the parties and about September 1st plaintiff's representative called on the defendant in Chicago for payment and at that time defendant insisted on an allowance being made on account of the late delivery of the shoes, but plaintiff refused to make any allowance.

We have examined defendant's affidavit of merits and its amended affidavit of merits and have been unable to find any averment that it had notified plaintiff that it would claim damages on account of the late delivery of the shoes. We think this was necessary under the statute, section 49, Sales Act, chapter 121½, Civil's 1929 Stats. It is certain that no such claim was made in the letter of June 1st. The most that can be said is that defendant entertained a hope that some allowance would be made, but this hope should not have continued after defendant received plaintiff's letter of June 7th, because it is plain from that letter that plaintiff intended to make no allowance. Under the undisputed evidence that defendant accepted and resold the shoes without notifying plaintiff that it would claim damages because of the delay in shipment, it is now estopped to assert any

such defense.

As to the second defense - that plaintiff and defendant orally agreed in the latter part of June that if defendant would keep the shoes plaintiff would make good defendant's loss on account of the delay in shipment - the evidence was in sharp conflict. Defendant offered evidence to the effect that such an agreement had been made, which was denied by plaintiff. We have examined all the evidence on this question and are clearly of the opinion that it was a proper question for the jury to decide and that we would not be warranted, under the evidence, in disturbing the finding of the jury in favor of plaintiff.

The next item in plaintiff's statement of claim is \$167.50, as to which plaintiff's contention is that it had sold defendant 2700 pairs of shoes on which it had made an allowance of 75¢ a pair on account of the shoes "checking;" that after plaintiff made this allowance, defendant returned the shoes to plaintiff, which the latter received, and in view of this fact defendant was not entitled to the credit of 75¢ a pair. On the other hand, defendant's evidence is to the effect that after the allowance of 75¢ a pair, defendant sold the shoes and that they were not returned to plaintiff; that defendant had purchased from plaintiff during the year 1927 about 37,000 pairs of shoes and that the shoes returned by defendant were shoes defendant had sold and its customers had returned, after they had been worn some time, because of defects in their manufacture. As to this item, we are also of the opinion that the question was a proper one for the jury. The case was on trial about four days and the jury and the trial Judge were in much better position to determine the facts, having seen and heard the witnesses, than we are from reading the printed page.

The next item of plaintiff's claim is \$277.05. Certain shoes were claimed by defendant to have been defective and were

As to the second defense - that Plaintiff and Defendant
mutually agreed in the latter part of June that if Defendant would keep
the above Plaintiff would make good Defendant's loss on account of
the delay in shipment - The evidence was in strong conflict. Defendant
threw evidence to the effect that such an agreement had been made,
which was denied by Plaintiff. To have admitted all the evidence on
this question and are clearly of the opinion that it was a proper
question for the jury to decide and that we would not be warranted
under the evidence, in disturbing the finding of the jury in favor

Plaintiff

The next item in Plaintiff's statement of claim is
\$127.50, as to which Plaintiff's contention is that it had sold the
above 1000 pairs of shoes on which it had made an allowance of 25%
off on account of the shoes "being" lost after shipment - and
his allowance, Defendant returned the shoes to Plaintiff, which the
court received, and in view of this fact Defendant was not entitled
to the credit of 25% a pair, on the other hand, Defendant's evidence
is to the effect that after the allowance of 25% a pair, Defendant
is the shoes and that they were not returned to Plaintiff; that the
Defendant had purchased from Plaintiff during the year 1937 about 17,000
pairs of shoes and that the shoes returned by Defendant were those
which had been sold and the evidence was conflicting, which fact was
also shown from the evidence of the fact that the shoes were a proper
loss, we are also of the opinion that the evidence was a proper
one for the jury. The case was so held about four days and the jury
and the trial judge was in much better position in determining the
case, having seen and heard the witnesses, than we are from reading
the printed page.

The next item in Plaintiff's claim is \$277.00. Defendant

returned to plaintiff. Plaintiff again sent these shoes back to defendant, claiming that they had been worn and that defendant was not entitled to any credit. Defendant admitted that it had received the shoes back and gave testimony to the effect that they were not worth more than 35¢ a pair. We are of the opinion that whether these shoes were so defective that the defendant was entitled to return them, was a question for the jury.

Plaintiff's next item is \$57.17 which plaintiff claims was a double discount allowed by plaintiff to defendant through plaintiff's mistake. Plaintiff's evidence was to the effect that it sent these shoes to the defendant, which the latter paid for after deducting a discount of 7 per cent; that subsequently these shoes were returned to plaintiff at the original selling price, for which the defendant was credited, and therefore defendant should not have received the discount of 7 per cent. We are unable to understand the position of defendant as to this item. But it seems to be that defendant returned the shoes and deducted the full invoice price from the amount of plaintiff's claim but that it did not deduct the 7 per cent discount in addition. In view of the fact that the plaintiff's position is clear, and the defendant's ambiguous, we think the verdict of the jury ought to stand.

The defendant contends that it was entitled to a credit of \$62.90 on account of express charges it had paid and which the plaintiff agreed to allow. The evidence is undisputed that defendant was entitled to this item, but plaintiff takes the position that it had been given credit for this sum. It appears from the evidence that on May 23, 1937, plaintiff wrote the defendant enclosing a credit memorandum for this \$62.90. A witness for defendant testified as to the amount of several bills which it owed plaintiff, the net amount of which he testified was \$1913.33; that defendant was entitled to a discount of 7 per cent on this item, or \$133.93, leaving a balance of

...to Plaintiff. Plaintiff also said that when she was
...that they had been with her and that defendant was not
...to her. Defendant admitted that he had been with her
...and gave testimony to the effect that they were not with
...at the time of the alleged rape. Defendant also stated
...that the defendant was entitled to return home, and
...for the jury.

Plaintiff's case was in effect a denial of the
...by Plaintiff to defendant. Plaintiff's evidence was to the effect that
...when the latter said "I am after
...that defendant is not guilty; that defendant is not guilty
...at the original trial, but which
...and defendant's testimony was not
...of the case. He was known to the jury.
...as to this fact. It is known to the jury
...and defendant the jury found that the latter was not
...that it did not believe the V was
...in addition. In view of the fact that the Plaintiff's
...we think the verdict
...is correct.

The defendant contends that it was entitled to a verdict
...of evidence charges it was not with the
...The evidence is sufficient to show that
...but Plaintiff's case was not sufficient to
...It appears from the evidence that
...was not sufficient to show that
...a verdict for defendant was warranted. The jury found
...as to this fact. It is known to the jury
...and defendant the jury found that the latter was not
...in addition. In view of the fact that the Plaintiff's
...we think the verdict
...is correct.

\$1779.40. He further testified there was a further credit of the item of \$62.90 for express charges and this would leave \$1716.50, and that defendant sent a check for the latter amount. Credit was given for this by plaintiff on November 25, 1907, which apparently was the time the payment was made. From this it seems to us it is clear that defendant was given credit for this item. But in any event we are unable to say that the finding of the jury in favor of the plaintiff is against the manifest weight of the evidence.

Defendant contends that it was also entitled to a credit of \$66.75, being 75¢ a pair on 89 pairs of shoes on the ground that there was no evidence to sustain this item, which was a part of plaintiff's claim, that the evidence offered by plaintiff was stricken out, and therefore there was no evidence to warrant the finding of the jury in favor of the plaintiff as to this sum. The record is not clear on this point. While the court did strike out some testimony of a witness concerning the 89 pairs of shoes, we are unable to say that there was not other evidence in the record on this item. The record is in such condition that we would not be warranted in holding that the judgment is excessive as to this item.

During the trial defendant asked leave to file a second amended affidavit of merits, which the court denied and it is contended that this was error. In this connection it is said that in plaintiff's statement of claim and its amended statement of claim it was alleged that plaintiff traded as "Liberty Shoe Company," and that during the cross-examination of one of plaintiff's representatives it developed that the Liberty Shoe Company was a corporation, and that when this appeared defendant prepared its second amended affidavit of merits in which it denied any liability to the plaintiff, the George S. Leavitt Company, a corporation, and asserted that if it owed any amount it was to the Liberty Shoe Company, a corporation. We think it is obvious that there is no merit in this contention. Plaintiff alleged in its statement

1275.00. The two or facilities were a 10:00 AM of the day
of 1275.00 for services charges and this would have 1275.00, and that
deducted from a check for the latter amount. Woods was given the
this by check on November 22, 1967, which apparently was the same
the payment was made. From this it seems to me it is about 1967
Leland was given credit for this item. But in any event we are unable
to get from the listing of the day in favor of the quantity in amount
the number was 1275.00 of the evidence.

[illegible]

During the trial testimony taken from the witness
concerned with the fact that the witness was not
that this was error. In this connection it is said that the plaintiff's
statement of claim was the subject of a motion for judgment
that plaintiff stated on "Liberty Bond Company," and that while the
process of execution of one of plaintiff's representatives is involved
that the Liberty Bond Company was a corporation, and that the fact
which defendant presented the record showed that the plaintiff
was in fact not liable to the plaintiff, and that the plaintiff
Company, a corporation, was involved that it is found very much in the
the Liberty Bond Company, a corporation. To show it is evident that

of claim that it was a corporation "trading as Liberty Shoe Company, a corporation," and the same allegation is made in plaintiff's amended statement of claim; so that it appears that defendant was apprised, from the inception of the suit, that the Liberty Shoe Company was a corporation. Rule 12 of the Municipal court provides that in an action by or against a corporation it shall not be necessary to prove the existence of such corporation unless such corporate existence is questioned by the other party; and plaintiff invokes this rule. To this defendant replies that this court will not take judicial notice of the rules of the Municipal court and cites a case sustaining this contention; but since the decision in the case cited by defendant the law has been changed by the legislature, so that now we take judicial notice of the rules of the Municipal court. Capital State Savings Bank v. Larson, 255 Ill. App. 479.

We have examined the other contentions made by defendant but none of them would warrant us in disturbing the verdict and judgment.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

[illegible]

The interest of the individual owner in the property is not to be taken into account in the determination of the value of the property for the purpose of the tax.

RECEIVED

Received 14 July 1998; accepted 15 October 1998

34139

BENJAMIN T. NEWTON,
Appellee,

vs.

CARROLL, SCHENDORF & BORNICKS,
INC.,
Appellant.

717
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.
25 89

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, a real estate broker, brought suit against the defendant corporation, also engaged in the real estate brokerage business, to recover \$900 claimed to be due him for one-half the commission obtained by the defendant for making an exchange of two pieces of real estate. There was a jury trial and a verdict and judgment in plaintiff's favor for the amount of his claim and defendant appeals.

Plaintiff's evidence was to the effect that in March or April, 1927, Julius Sider owned a piece of property at 3712 South State street, Chicago, and had listed it with plaintiff for sale or exchange; that on July 24, 1927, defendant advertised in the Tribune offering for sale property located at 6752 Oglesby avenue; that plaintiff upon seeing the advertisement telephoned defendant and spoke to defendant's representative, Mr. Hill, as the advertisement suggested, concerning the property and informed defendant that he was a real estate broker and inquired whether an exchange of property might be had; that Hill asked plaintiff what property he had and told him to bring it in to defendant's office; that plaintiff submitted to defendant three pieces of property belonging to Julius Sider - the South State street property, another piece located on east 47th street and a third piece at 63rd street and Princeton avenue; that after some negotiations the defendant's representative advised plaintiff that defendant's clients, the owners of the Oglesby avenue property, would not make an exchange for any of the three pieces of property.

The evidence was further to the effect that defendant's representative, Hill, stated to plaintiff that in case an exchange was made it would divide the commissions equally with plaintiff. The evidence also shows that on September 7, 1927, the owners of the Oglesby avenue property entered into a written contract with Morris Sider, son of Julius Sider, for the exchange of the Oglesby avenue property for the South State street property, the details of which it is unnecessary to state here; but it is sufficient to say that the Oglesby avenue property was valued at \$60,000 and that defendant received \$1800 commission from the owners of the Oglesby avenue property for bringing about the exchange and it is to recover one-half of this that plaintiff sues.

The evidence further shows that after the contract was made and the titles were being examined, defendant learned that the State street property was owned by Julius Sider and not by Morris Sider, who signed the contract. On September 28th Julius Sider and wife conveyed by quit claim deed the South State street property to their son, Morris Sider, the consideration mentioned being \$10,000, and on the same day Morris Sider and wife conveyed this property by warranty deed to the owners of the Oglesby avenue property, and the next day the owners of the Oglesby avenue property conveyed that property by warranty deed to Morris Sider's wife.

For the defendant, Hill testified that he had talked to the plaintiff concerning the exchange of property, but that plaintiff had never submitted the South State street property, but had submitted only the two other pieces of property which defendant's clients refused to accept in exchange for their property. There was further evidence to this effect.

It was the theory of the defendant that Morris Sider was looking around for some vacant property on which he wished to build a home for himself and wife, and went to defendant's place of busi-

The evidence was further to the effect that defendant's

representative, Hill, stated to plaintiff that in case an attempt

is made it would divide the ownership equally with plaintiff.

The evidence also shows that on September 7, 1937, the owner of the

property owned property which was a building containing this building

which was an office building, for the purpose of the office building

property the building was divided into two parts, one of which is

the ownership of which was not in defendant in 1937 and the

building was divided into two parts, one of which was owned by

defendant and the other part of the building was owned by plaintiff

for plaintiff about the evidence and it is the present record of this

case plaintiff wins.

The evidence further shows that after the building was

divided the building was being examined, defendant stated that the

building owned property was owned by James Miller and not by plaintiff

Miller, who signed the contract. On September 7, 1937, James Miller and

plaintiff entered by contract with the building and the building was

divided into two parts, one of which was owned by plaintiff and the

other part was owned by James Miller and the building was divided up

between them in the contract of the building owned by plaintiff, and the

part of the contract of the building owned by plaintiff was

signed by plaintiff and James Miller's wife.

For the defendant, Hill testified that he had signed in

the plaintiff concerning the ownership of property, but that plaintiff

had never submitted the building to the building, but had submitted

only the two other parts of property which were owned by plaintiff and

plaintiff in the contract of the building, but the building

was not in this case.

It was the theory of the defendant that James Miller was

looking around for some reason to sign in which he signed in which

he signed for himself and wife, and went to defendant's place of business

ness, he having known Mr. Carroll, one of the defendant's representatives, for several years; that he did not see Mr. Carroll or Mr. Hill but saw Mr. Johnson, one of the defendant's brokers, and that the defendant submitted to him the Oglesby avenue property. The evidence of the defendant was further to the effect that Morris Sider had purchased the South State street property from his father, paying him \$10,000 by check, as testified to by Morris Sider. The contention of defendant is that plaintiff did nothing towards bringing about the exchange of the properties; that Morris Sider bought the State street property from his father and made the exchange himself. A copy of the check which Morris testified he gave his father for the State street property is in the record and is dated November 20, 1927, two months after the deal was closed.

The defendant contends that the court should have directed a verdict for the defendant at the close of plaintiff's evidence as requested on the ground that at that time plaintiff had failed to make out a prima facie case. Whether the court should have sustained the contention of the defendant is not now before us because defendant, after the court had denied its motion, offered its evidence, so that the motion was waived. J. A. & E. Ry. Co. v. Valie, 140 Ill. 59; Fowler v. U. S. I. R. Co., 182 Ill. App. 123; West Chicago St. R. R. Co. v. McCallum, 169 Ill. 240; Cook v. Avermann, Appellate Court First District, No. 31275. (not reported.) Mayville v. French, 246 Ill. 434.

Complaint is also made that the court erred in admitting improper evidence on behalf of the plaintiff and refusing to admit proper evidence offered on behalf of defendant, and in support of this it is said: "The court arbitrarily overruled twenty-six objections of the defendant to the admission of improper evidence on behalf of the plaintiff, and about fourteen times the court sustained the objections of the plaintiff to proper evidence offered on behalf of the defendant." This is all the argument, and obviously is of no

[illegible]

benefit. The erroneous ruling should be specifically pointed out. It is not our function to search the record in an endeavor to ascertain whether there has been any error in the ruling of the court on the admission or exclusion of evidence.

A further point is made that the verdict is against the clear preponderance of the evidence. We have above set forth the substantial evidence and are clearly of the opinion that the verdict is in accordance with the evidence. In fact we are of the opinion that the verdict is the only one that could be rendered and be consistent with the evidence in the record.

Complaint is made to the conduct of the trial Judge and especially in the ruling on the admission and exclusion of evidence. Among other objections it is contended that the court erred in refusing to allow the witness, Julius Sider, who was called by the defendant, to testify to the conversation he had with plaintiff in March or April, 1927, concerning the State street and Oglesby avenue properties. We think this conversation was clearly admissible, but we are also of the opinion that the defendant is not in a position to urge this contention now, because when plaintiff was putting in his case and was on the stand testifying, he was interrogated as to this same conversation, but the defendant objected and the objection was erroneously sustained. Defendant having objected to plaintiff testifying to the conversation, it is in no position to say that the court erred in refusing to permit Julius Sider to testify to the same conversation, and this was the reason the court gave for excluding defendant's evidence on this question.

A reading of the entire record discloses that both sides made numerous technical and unwarranted objections and led the court into numerous errors on his rulings. In place of the trial being conducted so as to bring out the facts, frivolous objections were made and a number of them erroneously sustained so that a great deal

benefit. The extensive ruling should be specifically stated and
It is not our intention to search the record in an endeavor to deter-
mine whether there has been any error in the ruling of the court in
the admission of evidence of evidence.

A further point is made that the verdict is against the
clear preponderance of the evidence. We have shown that there is
substantial evidence and no clearly of the opinion that the verdict
is in accordance with the evidence. In fact we are of the opinion
that the verdict is the only one that could be rendered and be
consistent with the evidence in the record.

Complaint is made as to the conduct of the trial as to the
admission of the ruling on the admission and exclusion of evidence.
Among other objections it is contended that the court acted in re-
fusing to allow the witness, failing which, the verdict is the
verdict, in failing to the conversation as had with witness in error
on April, 1917, concerning the same witness and witness of the
fact. It is also contended that the witness was not properly
also of the opinion that the verdict is not in a position to
this contention now, because when witness was asked in his own
and was on the stand testifying, he was interrupted as to this
questioning, but the defendant objected and the objection was
properly sustained. Defendant further contends that witness
to the conversation, as is in the position in the trial the court
in refusing to permit witness to testify in the same manner.
First, that the law is not in favor of the defendant's ruling.
and a witness is required.

A ruling of the court is not a ground for reversal and the
this witness' testimony and numerous objections and the court
this witness' errors on his rulings. The ground of the trial
should be to bring out the facts, witness' testimony was

of proper evidence was excluded. But upon a careful consideration of all the evidence in the record, we think we would not be warranted in disturbing the verdict of the jury on account of the rulings on the admission or exclusion of evidence because on the whole the verdict is the only verdict that could be sustained.

The defendant contends that the court erred in giving five instructions. But these objections are not properly before us for a number of reasons. The record discloses that the court instructed the jury orally but apparently he read from written instructions given to him by both sides. After the court had read each instruction complained of, counsel for the defendant said: "I object to that instruction and take exception to the court giving it." The court said: "Let the record so show." This is not the proper method of preserving objections to oral instructions. It is the duty of counsel to specifically point out objections. Moreover, in the argument no reason is given why the instructions complained of are bad. After quoting one of the instructions, counsel in his brief says: "There is no evidence in the record to support this instruction." And after quoting another instruction counsel says: "This is not the law and it was erroneous for the court to give it." Again after quoting the next instruction counsel says: "This is a bold misstatement of the law. There is nothing in the entire record that calls for or in any manner justifies the giving of this instruction. It was simply a bay at the moon. After quoting the next instruction counsel says: "This is another misstatement of the law. It is beyond the writer's comprehension upon what theory the Honorable Trial Court gave such an instruction." It is obvious that such an argument is entirely insufficient. If counsel was of the opinion that any of the instructions was wrong, the particular objection should be pointed out. To say that an instruction is a misstatement of the law does not raise any question for us to decide. Where the law is said to have been mis-

...the only way in which the law can be made effective is by the application of the law to the facts of the case. The law is not a mere collection of rules, but a system of principles which guide the mind in the application of the law to the facts of the case. The law is not a mere collection of rules, but a system of principles which guide the mind in the application of the law to the facts of the case. The law is not a mere collection of rules, but a system of principles which guide the mind in the application of the law to the facts of the case.

stated it should be pointed out wherein the mistake lies.

Upon a careful consideration of the entire record we are of the opinion that the judgment of the Municipal court ought not to be disturbed.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

It is shown by the evidence that the defendant is a person of good character and of good standing in the community.

Upon a careful consideration of the evidence, the jury is of the opinion that the defendant is a person of good character and of good standing in the community.

The finding of the jury is that the defendant is a person of good character and of good standing in the community.

Witness,

Subscribed and sworn to before me this 1st day of January, 1901.

Notary, J. J. and Notary, J. J.

D. HAROLD HOFFMAN and DAVID
BECKER, copartners trading as
HOFFMAN & BECKER,

Appellants,

vs.

HARRY BLATTE,

Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

270 - 111. 394

88. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs, real estate brokers, brought suit against Joseph Wechselblatt and Harry Blatte to recover \$1410 claimed to be due them for obtaining a purchaser for a certain piece of property located in Chicago. Plaintiffs dismissed the suit as to Joseph Wechselblatt and an amended statement of claim was filed against the other defendant. At the close of the plaintiffs' case there was a directed verdict in favor of the defendant, and the plaintiffs appeal.

Plaintiffs' evidence was to the effect that they were real estate brokers and came in contact with the defendant, who owned a certain piece of property in Chicago and listed it with plaintiffs for sale; that plaintiffs obtained a prospective purchaser and negotiations were had; that finally the defendant sold the property to plaintiffs' customer for \$47,000; that plaintiffs were entitled to the regular real estate board commission of three per cent, or \$1410.

One of the plaintiffs gave testimony to the effect that on March 13, 1926, he went to the defendant's office and told him that he had talked with defendant's father, in whose name the title to the property was of record, about selling the property; that the father stated that defendant, his son, owned the property; that the defendant stated to the witness that he owned the property and that it was for sale; he further testified,

"With reference to the price, we agreed that I was to ask \$53,000 but he said he would take a smaller price for it, and that if he got \$51,000 for it he would pay me a commission;" That the witness again saw the defendant about two weeks later and told him he had Louis Goldberg, to whom the witness had shown the property, as a prospective purchaser; that Goldberg had offered \$49,000, which offer the defendant refused. "He said he wouldn't take it, he wanted \$50,000, and then I would have to get my commission in addition to that, so the price would be \$51,000." On cross-examination witness testified: "At that first meeting, that I got the listing (of the property) he didn't tell me that commission would only be paid if he received \$51,000 from the sale of the property. He told me that no commission would be paid unless the sum of \$50,000 net was obtained." He further testified that he saw the defendant a number of times thereafter and told him that the property was going down and that he would have to sell it for less; that about August 10, 1935, he again saw the defendant and testified, "If I am not mistaken, the purchase price discussed in August was \$49,000. It was less than the previous offer. see " And that "He told me the offer was not acceptable."

Goldberg, called by plaintiffs, testified that in March, 1935, he bought the property for \$47,000, negotiating directly with the defendant; that defendant's father gave the deed to the property. There is other evidence in the record tending to show further negotiations by the plaintiffs before the sale, but we think it unnecessary to refer to it.

Defendant's position, which the trial court sustained, was that when he listed the property with the plaintiffs a special agreement was entered into, whereby the plaintiffs were to find a purchaser for the property which would net the defendant \$50,000, and that since the evidence shows they did not meet the terms of

[illegible]

the contract, they were not entitled to any commission. In Rees v. Soruenco, 45 Ill. 308, Burke v. Pettis, 124 Ill. 499, and Mull v. Pasfield, 220 Ill. App. 1, it is held that a real estate agent is not entitled to commissions where his contract with the owner of property provides that he is to obtain a purchaser who will pay a net sum to the owner and he fails to do so; that where he submits a purchaser who buys the property at a less figure from the owner direct, who is guilty of no fraud, the broker is not entitled to a commission.

Plaintiffs in their reply briefs contend that the rule announced in the authorities above cited is not applicable in the instant case because, while it appears that when the property was first listed with the plaintiffs and they were authorized to find a purchaser for a price that would net the owner \$50,000, yet this was later modified by the fact that there were further negotiations whereby the defendant agreed to sell his property for less than \$50,000. If the evidence sustained counsel's contention, there would be much force in it; but we have above set forth the substance of the evidence, from which it appears that defendant did not agree to accept \$49,000 for the property but, as one of the plaintiffs testified, when such offer was made to him defendant said the offer was not acceptable. Plaintiffs, having had a special agreement with the defendant as to their commission and not having obtained a purchaser in accordance with their agreement, were entitled to no commission. It therefore follows that the court was correct in directing a verdict in defendant's favor.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

34343

TIFFANY PRODUCTIONS, Inc.,
Appellee.

vs.

WILLIAM S. RUSSELL, Commissioner
of Police of the City of Chicago,
Appellant.

Interlocutory Appeal
from Superior Court,
Cook County.

257 LA. 339

MR. JUSTICE MATHERTY DELIVERED THE OPINION OF THE COURT.

This appeal by the Commissioner of Police of the City of Chicago is from an interlocutory order which enjoins him from interfering with the exhibition of a photoplay entitled "Party Girl." Complainant has not appeared in this court to defend the order entered.

The bill for injunction was filed March 15, 1930, and it avers that the complainant is a corporation organized under the laws of New York and engaged in the business of producing motion pictures for the purpose of exhibition; that it produced the picture in question for the purpose of displaying the same in motion picture theatres; that there is in force and effect in the City of Chicago an ordinance which makes it unlawful for any firm or corporation to publicly exhibit a motion picture in the city, or to lease or transfer, or otherwise put into circulation, any motion picture for the purpose of exhibition within the city without having first secured a permit therefor from the superintendent of police. The bill sets up various sections 2708 and 2709 of the Chicago Municipal Code, being the ordinance in question, which directs that the permit shall be granted unless the picture has objectionable features. The bill alleges that the picture conformed to the requirements of the ordinance but that defendant without just cause refused to issue the permit.

It also avers that complainant made a contract to

THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE

IN SENATE
JANUARY 10, 1910

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
JANUARY 10, 1896, CONCERNING THE LANDS BELONGING TO THE
UNITED STATES IN THE TERRITORY OF ARIZONA

BY THE COMMISSIONER OF THE GENERAL LAND OFFICE

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1909

FOR SALE BY THE COMMISSIONER OF THE GENERAL LAND OFFICE

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exhibit this picture at one of the theatres of the city but that theatre owners feared to exhibit the picture because of threats made by the Commissioner to revoke the license of any theatre exhibiting a picture without having first secured a permit. The bill alleges that by reason of these threats complainant will suffer great loss unless the injunction is granted.

The story and plot of the picture, as set forth in the bill, deal with certain alleged customs and practices of business institutions and industries in connection with entertaining buyers and providing them with entertainment, and the picture depicts the medium whereby such entertainment is obtained.

Defendant filed a general demurrer to the bill, but the court overruled the demurrer, granted leave to file an answer and ordered that the temporary injunction against defendant issue as prayed.

The injunction should not have been granted. It has been held that the City has power to enact such ordinances as the one here set up. Block v. City of Chicago, 230 Ill. 281; Elever Harpet Kleenera v. City of Chicago, 323 Ill. 368.

It is also well settled that the remedy for a wrongful refusal on the part of the authorities to issue a permit in such case is by mandamus and not by way of injunction. It was so held as to a building ordinance in Grace Church v. City of Ken. 300 Ill. 513; as to an ordinance regulating the laying of railroad tracks in Pittsburgh, Ft. Wayne & Chicago Ry. Co. v. City of Chicago, 189 Ill. 369; as to a permit for a saloon license in City of Chicago v. O'Hara, 124 Ill. App. 290, and as to motion pictures in Vitagraph Co. v. City of Chicago, 200 Ill. App. 861. Chicago Public Stock Exchange v. McClaghry, 148 Ill. 378, is also in point.

The order will be reversed.

REVERSED.

McSorely, P. J., and O'Connor, J., concur.

It is the policy of the Department of the Interior to provide for the maximum protection of the public interest in the disposal of the public lands. The Department is committed to the principle that the public lands should be managed for the benefit and enjoyment of the people of the United States. The Department is also committed to the principle that the public lands should be managed in a manner that is consistent with the national policy of conservation. The Department is committed to the principle that the public lands should be managed in a manner that is consistent with the national policy of conservation.

The above was sent to the Director, on 10/10/1941.

Witnessed and signed a General Affidavit on the 10th day of May, 1901.

THE FOLLOWING INFORMATION WAS OBTAINED FROM THE RECORDS OF THE
BUREAU OF THE INSURANCE COMPANY OF AMERICA, NEW YORK, N. Y.
ON JANUARY 1, 1964, THE FOLLOWING INFORMATION WAS OBTAINED FROM THE
RECORDS OF THE INSURANCE COMPANY OF AMERICA, NEW YORK, N. Y.
ON JANUARY 1, 1964, THE FOLLOWING INFORMATION WAS OBTAINED FROM THE
RECORDS OF THE INSURANCE COMPANY OF AMERICA, NEW YORK, N. Y.

It is also well known that the people of the world are divided into two classes, the rich and the poor, and that the rich are the cause of the poverty of the poor. It is also well known that the rich are the cause of the poverty of the poor. It is also well known that the rich are the cause of the poverty of the poor.

33582

JOSEPHINE NOLAN,

(Complainant-Cross Defendant)

Appellant,

v.

JOHN J. NOLAN,

(Defendant-Cross Complainant),

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

257 I.A. 640

Opinion filed May 14, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Josephine Nolan, complainant, filed her bill for divorce and accounting against John J. Nolan, defendant. Later an amended bill was filed, to which defendant filed his answer, together with his cross-bill and later his supplemental cross-bill. The prayer of the bill for an accounting is not involved in this proceeding. The amended bill charged cruelty on the part of the defendant. The cross-bill as amended and the supplemental cross-bill charged the complainant with adultery.

The chancellor found the issues in favor of the cross-complainant on his cross-bill and against the complainant on her amended bill of complaint. The amended bill of complaint was dismissed for want of equity and a decree entered in favor of the cross-complainant, finding Josephine Nolan guilty of adultery, as charged in the cross-bill as amended and supplemental cross-bill, awarding the custody of the children to the cross-complainant, and dissolving the bonds of matrimony between John J. Nolan and Josephine, his wife. From this decree complainant Josephine Nolan prayed an appeal to this court.

The testimony is voluminous. A large number of

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Opinion filed May 12, 1930

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witnesses testified on both sides. No useful purpose could be accomplished by setting out the testimony in detail. There is ample evidence in the record in support of the finding of the chancellor that the complainant and cross-defendant was guilty of the charge of adultery.

In 1921, the cross-defendant was discovered ⁱⁿ company with one Louis Cimarrusti, under such circumstances as would plainly indicate misconduct on her part. After this event the parties lived together with full knowledge of this affair. In 1926 and 1927, the cross-defendant conducted herself in such a manner with one James Barrone, that the only inference that could be drawn from such conduct was that she was guilty of the charge of adultery, as set out in the cross-bill filed in the cause.

The chancellor heard the evidence and saw the witnesses and was in a much better position to weigh their evidence than this court would be. The findings of fact of the chancellor, under such circumstances, should not be disturbed unless palpable error has been committed.

The Supreme Court of this State in the case of Zimmerman v. Zimmerman, 348 Ill. 552, says:

"The chancellor saw the witnesses and heard them testify and was in a much better position to determine their credibility than we are. A court of review will not disturb the findings of fact of the chancellor under such circumstances unless it is apparent that clear and palpable error has been committed. (Doris v. Oriscoll, 203 Ill. 480, and cases there cited; Ringerstaff v. Ringerstaff, 180 Id. 407; Reyman v. Reyman, 210 Id. 524; Van der An v. Van Drunen, 208 Id. 108; Amos v. American Trust and Savings Bank, 221 Id. 100; Hudson v. Hudson, 222 Id. 527; Small v. Dingman, 227 Id. 294; Hilt v. Simpson, 230 Id. 170; Widmeyer v. Davis, 231 Id. 42; McDonnell v. Brown, 232 Id. 336.)"

The testimony in regard to cruelty on the part of the defendant, was conflicting. The weight of the testimony, under such circumstances, was peculiarly within the province of the

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chancellor who heard and saw the witnesses. We see no reason for disturbing his finding on this issue.

No error is assigned to the rulings of the trial court, as to the admission or exclusion of testimony.

The only proposition of law urged as a ground for reversal is that the chancellor was without authority to hear the proceeding and had no jurisdiction to enter the decree. From the record it appears that the chancellor was a duly elected judge of the Circuit Court of the sixth judicial circuit of the State of Illinois. The pleads in the cause shows that he was holding court in Cook County at the time of the proceeding at a regular term of the Superior Court of Cook County, held at the court house in the County of Cook, by request of the judges of the said Superior Court. From this it would appear that the Honorable James S. Baldwin, who presided at the hearing of this cause, did so by reason of a request of the judges of the Superior Court, in which court the cause was tried.

Chapter 37, Par. 108, Cahill's Illinois Revised Statutes, 1926, provides that judges of the several Circuit courts of this State may interchange with each other and with the judges of the Superior Court of Cook County. The practice of requesting judges of other circuits to sit in Cook County has been in force for a number of years, by virtue of the statutory provision referred to. We see no force in the argument that the trial judge was without jurisdiction to entertain the cause. Voitek v. Moran, 243 Ill. App. 363.

For the reasons stated in this opinion, the decree of the chancellor of the Superior Court is affirmed.

DECREE AFFIRMED.

RYDER AND HOLDEN, JJ. CONCUR.

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33780

MARION WERTHEIMER, by DAVID
WERTHEIMER, her next friend,

Appellee,

v.

WILLIAM J. RYAN CINDER COMPANY,
a Corporation, et al.

Appellants.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

257 L.A. 640

Opinion filed May 14, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

This is an appeal from a judgment rendered in an
action on the case in the Superior Court of Cook County, in
favor of the plaintiff, Marion Wertheimer, and against Ryan
Bros. Cinder Company, a corporation.

Plaintiff was struck and injured by a truck claimed
to have been owned by the defendant, Ryan Bros. Cinder Company.
The weight of the testimony and the amount of the verdict are
not discussed in the brief, but it is urged as a ground for
reversal that the trial court erred: 1st, in refusing to grant
Ryan Bros. Cinder Company a continuance when said cause was
reached for trial; 2nd, in failing to allow the defendant the
right to file a special plea, denying ownership and an additional
plea of mul tiel corporation; 3rd, in refusing proper testimony
on the part of the defendant; and 4th, in giving the jury improper
instructions.

The third ground urged as reversal, pertained to the
offer of the defendant to prove that Ryan Bros. Cinder Company
did not own the truck which caused the accident. The action of
the trial court in refusing this testimony was proper, if its
action in denying the right to file a plea of non-ownership was
correct.

The same is true of the fourth ground for reversal in as much as it was an instruction to the effect that the defendant, by its pleadings, admitted possession and control of the truck in question.

There appears to be but two questions presented to this court for consideration; namely, those involved in the first and second grounds for reversal assigned as error and argued in the brief.

The record discloses that the original declaration made the William J. Ryan Cinder Company, a corporation, and Chicago Railways Company, a corporation, defendants to the action. An amended declaration subsequently filed included William J. Ryan, Sr., as an additional party defendant. The amended declaration, when filed, contained the name of Ryan Bros. Cinder Company, a corporation, as defendant. This last defendant was made a party without leave of court but entered its appearance and filed its plea. Any error that might have occurred by reason of the additional party defendant without leave, was cured by the filing of its plea. Additional counts were subsequently filed, to which the William J. Ryan Cinder Company, a corporation, filed a plea of the general issue and special pleas. The Ryan Bros. Cinder Company, a corporation, filed a plea of the general issue only. The cause was dismissed for want of prosecution, but regularly reinstated and was reached for trial in its regular order upon the trial call. When the case was called for trial, counsel for the defendant, Ryan Bros. Cinder Company, a corporation, asked leave to file special pleas denying ownership and operation. This motion was denied, and we believe properly so. At this time the plaintiff was 18 years of age and no longer a minor, and the statutory period of limitations had expired. All defendants except Ryan Bros. Cinder Company have been dismissed out of the proceeding.

The same is also of the former general for revision in
as much as it was an instruction to the effect that the defendant
by its pleadings, admitted possession and custody of the items
in question.

There appears to be but one question presented as
this case for consideration; namely, those involved in the
first and second grounds for reversal claimed as error and
engaged in the trial.

The second claimant that the original declaration
made the William L. Ryan Circuit Company, a corporation, and
Chicago Building Company, a corporation, defendants to the
action. In answer thereto, the defendant Ryan Building
Company, Ryan, Inc., an additional party defendant. The
original declaration, when filed, contained the names of
Ryan Building Company, a corporation, as defendant. This last
defendant was made a party without leave of court but entered
its appearance and filed its plea. The error that might be
suggested by reason of the original party defendant of Ryan
Building, was cured by the filing of its plea. Additional counts
were subsequently filed, so that the William L. Ryan Circuit
Company, a corporation, filed a plea of the general issue and
verdict given. The Ryan Building Company, a corporation, filed
a plea of the general issue only. The names are disclosed for
each of the defendants, they regularly appeared and were present
the trial in its regular court upon the trial roll. When the case
was called for trial, counsel for the defendant, Ryan Building
Company, a corporation, asked leave to file special pleas
defended verily and verily. This motion was denied, and as
verdict properly so. At this time the plaintiff was in possession
and no longer a claim, and the majority portion of the trial
had expired. All witnesses except Ryan Building Company

The ownership of the truck was a question which was well known to the defendant and a matter of conjecture to the plaintiff. It raises no hardship to require the defendant to deny ownership by a special plea and thus afford the plaintiff an opportunity to seek further in search of the real owner of the instrumentality which caused the injury. The right to file such a plea after the statute of limitations had run, would cause an irreparable injury to the plaintiff, and defendant should not be permitted to stand by until that period of time had expired and then surprise the plaintiff by denying ownership.

We are cited the case of Clark v. Wisconsin Central Ry. Co., 261 Ill. 407. That case, however, is expressly distinguished and the rule established in Musler v. Hayes, 321 Ill. 375, where it was held that a plea of general issue does not put in issue the question of ownership nor possession, but that such fact must be raised by a special plea.

It is also urged as a ground for reversal that the court erred in not granting defendant a continuance when the cause was reached for trial. There was no written motion nor affidavit in support of the same. It was stated in open court that the continuance was requested because of the absence of certain witnesses. There does not appear in the record, however, anything showing what the witnesses would testify to if present, nor any affidavit nor statement in support of the fact that they were material witnesses and that the defendant could not safely proceed without them.

The Practice Act, Chapter 110, Sec. 62, Cahill's Statutes, provides for the manner in which an application for a continuance shall be made and upon what ground it may be granted. Under this section, a motion for a continuance

The ownership of the truck was a question which

was well known to the defendant and a matter of conjecture

to the plaintiff. It raises no question as to the defendant's

to deny ownership by a special plea and thus allow the plain-

with an opportunity to state further in support of the fact that

of the instrumentality which caused the injury. The right to

file such a plea after the statute of limitations has run,

would cause an irreparable injury to the plaintiff, and defendant

should not be permitted to stand by until that period of time

had expired and then surprise the plaintiff by denying ownership.

We also cited the case of Clark v. Laramie National

Bank, 121 Ill. 407, 104 Ill. 407, 104 Ill. 407, 104 Ill. 407.

affirmed and the rule established in Clark v. Laramie

Bank, 121 Ill. 407, where it was held that a plea of denial is

does not put in issue the question of ownership, nor responsibility,

but that such plea may be raised by a special plea.

It is also noted as a ground for dismissal that the

plaintiff failed to state in his complaint that the

defendant was required to file. There was no written notice nor

affidavit in support of the claim. It was stated in some cases

that the defendant was required to make an affidavit of

good faith in answer to the plaintiff's demand. However,

nothing should be said that the defendant would be liable to it.

and any affidavit or statement in support of the fact that the

defendant was liable and that the defendant would not be

held without them.

The plaintiff's motion for judgment was denied, and the

case was remanded for the purpose of which an affidavit

should be made and upon that basis a

judgment should be made.

should be supported by an affidavit by the party asking for the continuance, showing due diligence and the fact or facts which could be proven by the witness. There was no compliance with this section of the Practice Act on the part of the defendant. There was nothing before the trial court on which it could grant a continuance, and there is nothing before us.

It is argued that the court should have granted a continuance because of the fact that there were new counsel in the case, but there is nothing in the record showing how long they had been retained, nor does it appear that they had no knowledge of the facts. The motion for leave to file a plea of non tiel corporation was properly denied, for the reasons pointed out in that part of this opinion dealing with the question of the right to file a plea of non-ownership. A plea of this character should be filed at the earliest opportunity in order to provide plaintiff with an opportunity to correct his pleadings and supply a proper party defendant.

We see no error in the ruling of the trial court on the questions presented here for consideration.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

RYNEN, J. CONCURS
HOLDEN, J. NOT PARTICIPATING.

33792

BERT SCHREIBER,

Appellee,

v.

ABE CONER,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed May 14, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The bill of exceptions in this cause was stricken on motion in accordance with the rule announced in McKay v. The People, 145 Ill. App. 277. We are not asked to reverse because of any error apparent on the common law record. There is, consequently, nothing before this court for consideration.

For the reasons stated, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

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Opinion filed May 14, 1930

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The bill of exceptions in this case was filed on motion in accordance with the rule announced in People v. People, 120 Ill. App. 3d 107. It was not until the review because of any error occurred on the common law review. It is, consequently, not binding before this court for consideration. For the reasons stated, the judgment of the court is affirmed.

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33883

ALBERT PICK & COMPANY,
a corporation,
(Plaintiff) Appellee,
v.
CHICAGO TRUST COMPANY,
(Defendant) Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

251 LA. 640⁴

Opinion filed May 14, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Albert Pick & Company, a corporation, plaintiff, filed its statement of claim charging that on August 26, 1927, the defendant, Chicago Trust Company, undertook and promised in writing to pay the plaintiff \$2,500 when it, the plaintiff, had laid certain carpets for one Arthur W. Dickinson at 4815-4845 Belle Plaine Avenue, Chicago; charges that the said plaintiff laid said carpets for the said Dickinson and that, although requested so to do, the said Dickinson has not paid the balance due, amounting to \$3,807.02. Charges that it presented its claim to the defendant, in accordance with the agreement of the defendant to pay, but that said defendant refused and still refuses to pay the balance of \$3,000, together with interest at five per cent from August 2, 1928.

The defendant filed its affidavit of merits, setting up a certain agreement dated August 25, 1927, under the caption, "Dickinson Loan #11549, 4815-45 Belleplaine Avenue", which provided that the defendant had set aside \$2,500 for the payment of said carpet after the same had been properly laid and subject to the approval of the engineers and the defendant who would inspect the job when completed. Defendant further charged that

ALBERT T. & COMPANY, INC.
a corporation

(Plaintiff)

v.

WILLIAM T. & COMPANY, INC.

(Defendant)

Opinion filed May 14, 1930

THE FOLLOWING OPINION WAS DELIVERED BY THE COURT:

of the court.

ALBERT T. & COMPANY, INC., a corporation, Plaintiff,

vs. WILLIAM T. & COMPANY, INC., a corporation, Defendant.

The following facts are stated in the complaint:

That on or about May 1, 1929, the defendant, WILLIAM T. & COMPANY, INC.,

did cause to be prepared and printed a certain number of

certificates of stock, which were then distributed to the

plaintiff, ALBERT T. & COMPANY, INC., for the said defendant and

although requested to do so, the said defendant has not

the balance due, amounting to \$1,500.00. Charges that it

presented its claim to the defendant, in accordance with the

agreement of the defendant to pay, but that said defendant

refused and still refuses to pay the balance of \$1,500.00, together

with interest at five per cent from August 1, 1929.

The defendant filed its answer to said complaint, denying

up a certain agreement dated August 1, 1927, which was made,

"NICHOLSON Loan 11112, 11113-15 Relinquishing Interest," which

provided that the defendant had not paid \$1,500.00 for the interest

of said notes which was due and payable, and that the

in the payment of the interest and the defendant was

interest for the same period. Defendant further alleged that

"The plaintiff did not lay the carpet stipulated in the said contract made by and between the said Albert Pick and Company and the said Dickinson, and avers that its engineer in its said agreement mentioned did inspect the said job and did not and has not approved of the said carpet as laid." Charges further that Albert Pick & Company warranted that the said carpet would be of the material and quality as the sample exhibited and would warrant the carpet for a period of at least three years, but that the said carpet is inferior in quality and has not lasted six months.

An examination of the affidavit of merits discloses that the defense is a positive defense of warranty and the failure of the plaintiff to comply with the representations and warranties as set out in the affidavit of merits. Under this defense the burden was upon the defendant to prove the failure of the plaintiff to comply with its agreement.

It is insisted on behalf of the defendant that under the affidavit of merits, there is a general denial of the laying of the carpet, but as to this we cannot agree. In the first place the affidavit charges that the plaintiff did not lay the carpet stipulated in the said contract and, in the same breath, charges that its engineer inspected said job and had not approved the same. The words, "did not lay the carpet stipulated in said contract" evidently refers to the fact that the carpet was laid but not laid in accordance with the warranty. This averment was not a direct positive denial of the fact that the carpet was laid.

The defendant introduced no evidence on its own behalf on the trial of the cause. The cause was tried before the court without a jury, resulting in a finding in favor of the plaintiff in the amount of \$3,100 and judgment was entered upon the finding.

"The plaintiff did not lay the charges stipulated in the contract made by and between the said Albert and company and the said defendant, and wrote that the plaintiff in the said agreement mentioned his request that said defendant should not approve of the said charges as laid." "Whereas the said Albert and company witnessed that the said charges were laid of the material and quality as the sample exhibited and used, and that the charges for a period of six months were laid, and that the said charges in relation to quality and quantity were laid as follows:

An examination of the exhibits of various materials that the defendant is a positive failure of quantity and the failure of the plaintiff to comply with the requirements and conditions as set out in the exhibits of quality, and this failure was found by the defendant as set out in the failure of the plaintiff to comply with the requirements.

It is further on behalf of the defendant that under the exhibits of quality, there is a general denial of the laying of the charges, but as to this we cannot agree. In the first place the exhibits show that the plaintiff did not lay the charges stipulated in the said contract and, in the second, charges that the defendant requested said defendant not lay the charges, and the charges stipulated in the same. The charges, "did not lay the charges stipulated in the same," witness, "witness" refers to the fact that the charges were laid and not laid in accordance with the contract. The charges were not a direct positive denial of the fact that the charges were laid.

The defendant introduced as evidence in the said contract on the trial of the same. The charges were laid before the jury, resulting in a finding in favor of the plaintiff. In the amount of \$1,100 and judgment was entered upon the finding.

From that judgment this appeal is perfected.

The testimony as to the laying of the carpet is not clear, but there is sufficient from which it can be gathered that it was, in fact, laid.

Myron D. Litt testified as to the condition in which he found the carpet at the time he visited the premises. G. A. Braun, another witness, testified to the same effect.

Arthur W. Dickinson, on whose behalf the work was done, identified four certain documents: The first, an estimate as to the cost by Albert Pick & Company; the second, specifications by Albert Pick & Company; the third, an order on the Chicago Trust Company in favor of Albert Pick & Company, signed by himself for the balance due; and the fourth, a letter to Albert Pick & Company, stating therein that they would find an order enclosed for the sum of \$8,500, which the said Albert Pick & Company were to credit to Dickinson's account.

There was some additional evidence in the record in regard to a demand made upon the trust company to pay, to which objection was made and the admission of which was assigned as error. The cause having been tried by the court without a jury, it is presumed that the court acted only upon such evidence as was material and competent.

We are referred by defendant to the case of American Hard Rubber Co. v. Hogg, 280 Ill. 431, in which it appears that the court held that even though the defense was a guaranty, nevertheless, there appeared to be in the affidavit a denial of the allegation of the statement of claim that the work was done.

The case at bar, however, is distinguishable in that the affidavit of defense does not contain, as already pointed

from that judgment this appeal is presented.

The testimony as to the taking of the parcel is not clear, but there is sufficient from which it can be gathered that it was, in fact, taken.

Byron E. Rice testified as to the taking of the parcel. He found the parcel at the time he visited the premises. A. Brown, another witness, testified as to the taking.

Arthur E. Robinson, on whose behalf the suit was brought, testified that certain documents, the first, in which he is named as the owner of the parcel, the second, executed by Albert Rice & Company, the third, an order on the Chicago Trust Company in favor of Albert Rice & Company, signed by himself for the balance due; and the fourth, a letter to Albert Rice & Company, dated March 1911, that they would find an order enclosed for the sum of \$5,000, which the said Albert Rice & Company were to deliver to Robinson's account.

There are some additional witnesses in the record in regard to a demand made upon the first company in 1911, to which objection was made and the question of when the demand was made. The same having been filed by the court in 1911, it is presumed that the court acted only upon such evidence as was material and competent.

It was referred by the court to the case of Robinson v. Rice, 200 Ill. 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The case of Robinson v. Rice, 200 Ill. 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

out, a direct positive denial of the laying of the carpet, but only that it was not laid in the manner stipulated in the agreement. As stated, this was a matter of defense.

As we have already said, there is considerable ambiguity in the record, but this court is inclined to believe that there is sufficient based upon the evidence and the pleadings to warrant an affirmance of the judgment.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

RYNN AND HOLDON, JJ. CONCUR.

that a direct positive result of the inquiry is the fact, and
only that it was not said in the manner indicated in the above-
mentioned. In addition, this was a matter of balance.

As we have already said, there is considerable
ambiguity in the record, but this seems to be indicated as relative
that there is sufficient ground upon the balance and the prob-
able to return to the balance of the judgment.

For the reasons stated in this opinion, the judgment
of the majority seems to be affirmed.

REVEREND JUSTICE

THE COURT OF APPEALS, 1911, 1912.

33850

NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, a Corporation,

Appellee,

v.

S. F. GOONEY and T. W. KORSHAK,
Doing Business as GOONEY & KORSHAK,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

257 I.A. 641

Opinion filed May 14, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

Plaintiff, New York, New Haven and Hartford Railroad
Company, a corporation, filed its claim in the Municipal Court
against the defendants, S. F. Gooney and T. W. Korshak, doing
business as Gooney & Korshak, charging that "defendants were
the legal owners and holders of a bill of lading for a ship-
ment and the property constituting the same, consisting of
a carload containing 875 baskets of spinach * * * shipped
from Austin Texas, on the 22nd day of March, A. D. 1926, * * *
consigned to St. Louis, Missouri, and * * * reconsigned and
diverted to New Haven, Connecticut, and again * * * reconsigned
and diverted by the defendants to Providence, Rhode Island,
and again * * * reconsigned and diverted by the said defendants
to Boston, Massachusetts, and that said shipment was transported
as herein alleged and set forth."

Charges that the freight, reconsigning, diverting and
loading charges were \$408.95; that demand and request for the
payment thereof had been made upon the defendants, but that the
account has not been paid.

Judgment by default was entered for want of appearance,
March 1, 1929. This judgment was vacated on motion of defendants.
Time to file affidavit of merits was extended ten days from

March 25, 1939. Time to file affidavit of merits was again extended ten days from April 8, 1939. Judgment was entered by default for want of an affidavit of merits. Plaintiff's damages were assessed at the sum of \$406.98, and judgment was entered on the finding. May 21, 1939, defendants moved to vacate said judgment which was denied and this appeal taken.

In Support of the motion to vacate the judgment, the attorney for the defendants filed his affidavit, stating that on the day judgment was entered he was engaged in a federal matter (of what kind he does not state) and could not be present in court to present his motion for a continuance. Further states that he was unable to find the files because the shipment had been the subject of two other law suits; states further that he, the affiant, has no knowledge as to whether this shipment was ever delivered by the plaintiff to the defendants.

The statement of claim in a previous suit between defendants and the Missouri-Kansas-Texas Railroad Company of Texas in regard to the same shipment, in a suit started by the defendants here, charged in effect that the goods were so improperly transported that they were wholly lost to the plaintiff.

It is sought to reverse the judgment on the ground that the statement of claim filed in this action failed to state a cause of action because it did not charge directly, delivery to the defendants.

The affidavit filed in support of the motion to vacate the judgment did not state that the goods were not received by the defendants, and the court had the right to take judicial notice of its own records and to consider in that connection the fact that defendants had themselves started a suit to recover damages against a previous company because of the fact that the goods were destroyed and unacceptable to the defendants.

We do not believe, however, that the statement of claim itself is insufficient. Chapter 498, section 40 of the Municipal Court Act, Cahill's Revised Statutes of 1928, provides that in every case of the fourth class, the statement in an action upon a contract expressed or implied, shall consist of a statement of the account or of the nature of the demand. It is provided further under said section that if the suit be for a tort, it shall consist of a brief statement of the nature of the tort and such further information as will reasonably inform the defendant of the nature of the case he is called upon to defend. We are referred by counsel for plaintiff to the case of Gillman v. Chicago Railways Co., 308 Ill. 308, and other cases, an examination of which discloses that they were actions in tort. The courts require more particularity in actions of such a character than is required in actions on a contract either expressed or implied. Capital State Savings Bank v. Larson, 350 Ill. App. 479; McClunn v. Gillespie, 337 Ill. App. 400.

The statement of claim filed in the present suit was sufficiently broad. It stated the grounds on which the claim was predicated. Such a statement is not required to have the certainty of pleading at common law. In the case at bar the question was not raised on a motion to strike, but after default and without a denial of the delivery.

The trial court properly denied the motion to vacate, particularly as the affidavit showed no diligence on the part of the defendants. The position taken by the defendants that the delivery should have been made within three years, cannot be raised on a motion to vacate the default, as it is properly a matter in abatement and would have been considered if properly and reasonably presented.

We find no reason to disturb the judgment of the trial court.

For the reasons stated in this opinion, the order of the Municipal Court denying the motion to vacate the judgment, is affirmed.

JUDGMENT AFFIRMED.

RYNER, J. CONCURS,

HOLDOM, J. NOT PARTICIPATING.

23871

EVA FITCH DUNNE,

(Plaintiff) Appellee,

v.

GORA M. IVES,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT,

COOE COUNTY.

257 L.A. 641²



Opinion filed May 14, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Plaintiff, Eva Fitch Dunne, obtained a judgment on a lease by confession for rent in the amount of \$550.00, against the defendant Gora M. Ives. The defendant filed her motion in writing, asking to have the judgment by confession vacated and defendant be given leave to plead. In support of her motion two affidavits were filed, the first of which was signed and subscribed by the defendant. Among other things, it is stated that the rent was paid for each month up to December, 1928, and that the adopted course of dealing during the months prior to December was that the rent was paid on or about the 15th of each month or thereafter. The affidavit filed on behalf of the defendant by Margaret Ives, a daughter, charges that she was advised by plaintiff's counsel that a lease was made prior to the middle of December, 1928, to another tenant.

The rent for which judgment was confessed, so far as we are able to ascertain from the abstract filed in said case, is for the months of December, 1928, January, February, March and April of 1929, less such amount as had been collected from the new tenant.

While the affidavits in support of the motion are not as definite and certain in their allegations as they could be made, never-the-less, it appears that, by a course of dealing,

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the landlord had waived a strict compliance with the terms of the lease and instead of insisting upon payment on or before the first of each month, had acquiesced in the payment of rent on the middle of each month. If this were a fact, and the lease to the new tenant was made before the 15th of December, 1878, without a notice by the landlord that he required strict compliance with the terms of the lease in regard to the payment of rent on the first of December, it might under the circumstances, amount to an eviction. This would be a fact to be shown by the evidence which should be considered by the trial court for the purpose of ascertaining whether the parties, by their conduct, had waived strict compliance with the terms of the lease.

It is insisted on behalf of the plaintiff that the cause should be dismissed because the bond in the case was approved by a judge of the Circuit court, other than the judge before whom the confession of judgment was had. No motion to dismiss for insufficiency of the bond was made in the trial court or here, nor does the abstract show by whom the bond was approved. It is against the policy of the courts of this State to dismiss the proceeding for insufficiency of the appeal bond, but it will aid in the procuring of a better bond when a proper motion is made for that purpose in the suit. The bond in this case was approved by a judge of the Circuit Court, but not the one before whom the proceeding was had. We see no objection to this proceeding, particularly in view of the situation as set forth in this record.

For the reasons stated in this opinion, the judgment is reversed with directions to vacate the judgment and grant the defendant leave to plead.

JUDGMENT REVERSED WITH DIRECTIONS.

MYER, J. CONCURS.
HOLDEN, J. NOT PARTICIPATING.

The defendant has waived a trial by jury and the court has
the issue and has ruled in favor of the defendant. The
first of such cases, but significant in the history of the
on the issue of such cases. It is true that, and the law
of the new system was made before the 18th of January, 1908,
without a finding by the defendant that he was not guilty of the
charge with the issue of the issue in regard to the payment
of rent to the first of January, it is not under the circumstances
amount to an admission. This would be a fact to be shown by the
evidence which should be submitted by the trial court and the
court, it is not necessary to state the facts, by their conduct,
but waived their right to a trial by jury of the issue.

It is further to submit to the court that the
court should be directed because the defendant has waived a trial
by a jury of the issue of such cases, other than the issue of such
the question of judgment was left. The matter of January 18,
the defendant of the court was made in the trial court on such
that was the defendant when the court was removed. It is
against the policy of the court of this State to demand the
proceeding for insolvency of the court, and it is not
in the proceeding of a court when a court is not in such
The first finding in the case. The court in this case was removed
by a jury of the issue of such cases, but not the court when the
removal was not. It is not necessary to this proceeding.
particularly in view of the defendant on the facts in this case.

That the defendant is in this position, and the
court is directed to direct the defendant to
grant the defendant leave to file.

THE COURT GRANTED THE DEFENDANT.

RECEIVED BY THE COURT
JANUARY 18, 1908

33861

E DWARD J. MUNT,
(Plaintiff) Appellee,
v.
MONIKA BELL,
(Defendant) Appellant.

APPEAL FROM
SUPERIOR COURT,
COCK COUNTY.

257 L.A. 641³

Opinion filed May 14, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

This cause has been consolidated with general
number 33860, and involves the same questions decided by this
court in that action.

For the reasons stated in that opinion, the order
of the Superior Court in this cause is reversed and the cause
remanded for further proceedings not inconsistent with this
opinion.

ORDER REVERSED AND
CAUSE REMANDED.

RYNER, J. CONCURS,
HOLDON, J. NOT PARTICIPATING.

33887

CRUYER MANUFACTURING COMPANY, INC.,
a Corporation,

(Plaintiff) Appellee,

v.

I. GOLDBERG ELECTRIC COMPANY, a
Corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

257 LA. 641

Opinion filed May 14, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Crayer Manufacturing Company, Inc., a corporation, brought its action in the Municipal Court of Chicago as an action of the first class against the defendant I. Goldberg Electric Company, a corporation, claiming damages for an alleged breach of contract. The cause was heard by the court without a jury, resulting in a finding in favor of the plaintiff and assessing damages in the sum of \$4,728.58. Upon this finding judgment was entered and this appeal prayed and allowed.

The pleadings upon which the cause was tried consisted of an amended statement of claim, an affidavit of merits filed by the defendant and a plea of set-off. No proof was introduced in support of the plea of set-off, nor is any error urged in the brief of defendant based upon this plea.

Plaintiff's claim is upon an alleged oral agreement entered into between the plaintiff and the defendant sometime in February 1924. By this agreement, as charged by plaintiff, the defendant, which was engaged in the manufacture of radio sets, undertook to take from the plaintiff all its seasonal requirements for condensers, amounting to approximately 18,000 in number. Plaintiff claims that in discussing the terms of

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1. The Board of Directors of the Corporation shall have the right to declare dividends on the common stock of the Corporation out of the assets of the Corporation available for the payment of dividends.

the contract, its representative stated to the defendant that in order to take care of this number of condensers, it would be necessary for the plaintiff to purchase material, make dies and go to considerable expense preparatory to undertaking the manufacture of the article in question; that in order to show the good faith of the defendant, the plaintiff required assurances on the part of the defendant, and that this would be evidenced by an order for 1,000. This also would determine what would be the cost.

Thereafter, on April 21, 1924, the defendant gave its first order for 1,000 25-plate condensers at \$2.00 each, as per sample to be submitted. July 8, 1924, the defendant gave its second written order for 1,000 25-plate condensers, subject to approval. December 2, 1924, plaintiff gave an order for 3000 25-plate condensers. These three orders were accepted.

The order of April 21, 1924, was accepted on terms of one per cent ten days, or thirty days net; the order of July 8, was accepted on terms, two per cent ten days, or thirty days net; the order of December 2nd was accepted on terms of two per cent ten days, or thirty days net.

After delivery, some of the condensers were returned as defective, and were subsequently repaired and placed in proper condition by the plaintiff. In May or June, 1925, the defendant discontinued the business of manufacturing radio sets and, consequently, had no further use for the condensers.

Plaintiff's case is based upon the failure of the defendant to accept the balance of the orders and for damages sustained by reason of the failure of the defendant to fulfill its part of the contract, leaving the plaintiff with the stock on hand. This stock, together with the dies, jigs, assembling

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1. The Committee on the Administration of the Government of the District of Columbia, created by the District of Columbia Organic Act of 1801, and continued by subsequent Acts of Congress, has the honor to acknowledge the receipt of your letter of the 10th inst., and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

The following is a list of the names of the persons who have been
 identified as having been in contact with the subject of this report
 during the period of the investigation. The names are listed in
 alphabetical order.

tools and material, was purchased by the plaintiff for special use in the manufacture of condensers to be taken by the defendant under the alleged seasonal contract.

It is insisted on behalf of the defendant that the orders were separate contracts in writing and that parol evidence was not admissible to vary their terms. It is also insisted that no parol agreement was entered into and, further, that if it were it would be subject to the Statute of Frauds because it was not to be performed within a year. In support of this last contention there was some evidence showing that the radio business commenced in October and continued until the following April and that the contract claimed by the plaintiff, having been made some time in February, 1934, did not expire until April, 1935. The answer to this last contention is that the contract might have been completed within the period of one year after the agreement of the parties. Hills v. Howe, 237 Ill. 375. In other words, all of the required number of condensers might have been ordered and delivered prior to the expiration of the season in April, 1935. Moreover the breach by defendant occurred before the expiration of the time limit and the cause of action accrued to plaintiff.

The testimony as to the oral agreement or understanding between the parties appears to be based upon the testimony of Proudfoot, the engineer representing the plaintiff, a graduate of Massachusetts Institute of Technology, and Ther, an engineer in charge of defendant's radio department.

Proudfoot testified that he was employed ^{by} the plaintiff in the management of the radio department; that he had a talk with Ther in the early part of 1934 and later on or about the 1st of April, 1934; that during these conversations Ther said they were going to put out a radio set and asked him if his

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The following is the text of the letterhead memorandum
between the parties hereto in the matter of the
HONORABLE, the undersigned, and the undersigned,
of the undersigned, and the undersigned, and the undersigned,
in the matter of the undersigned, and the undersigned.

They were going to get a bottle and make a little
 that he will, that's what you want to see that
 with that in the way of it and make an account of
 in the management of the work department; that he will
 The following is the list of the work department:

company could design a condenser that would be satisfactory to them; that they wanted the plaintiff to supply all of their condensers, amounting to approximately 15,000; that he told Ther he would require an order from them in order to show their good will and make it possible for him to design a special condenser. They gave him the order on the 31st of April, 1924; that he told them that it would be a very expensive job making the dies and assembling tools, and that it would not pay his company to do this unless they got a large volume of business; that he told Ther that the payment would be two per cent ten days, or thirty days net, and that Ther said that was O. K.; that he told Ther he would have to have defendant's total seasons supply, and Ther then told him the orders of the defendant would amount to 15,000 a year. The witness testified further that the condenser in question was manufactured by the plaintiff in accordance with special specifications furnished by Mr. Ther, usable only in sets manufactured by the defendant. Changes in the condenser were made from time to time, as testified to by the witness, at the special request of the defendant. The witness testified that he was no longer employed by the plaintiff.

Ther, a witness on behalf of the defendant, testified that he had a number of talks with Proudfoot about the condenser and the manner in which it was to be made. He testified that his company had trouble with the condenser and that, in some instances, the condenser would pass stations through and others it did not, and that it did not tune in on stations; that he told Proudfoot that they were having trouble with it and pointed out to him the defects.

The court heard the testimony of these and other witnesses, had before it all the documentary evidence, and found that there was an oral agreement between the parties for the

[illegible]

manufacture and delivery of the condensers by the plaintiff, and their acceptance by the defendant as required during the radio season following the agreement. In our opinion there is sufficient proof in the record, on behalf of the plaintiff, to show that there was such an understanding between the parties. The court having seen and heard the witnesses was in a better position to pass on their credibility than is a court of review. We are not called upon to reverse the judgment of the lower court unless it is manifestly against the weight of the evidence.

We see no point in the position taken by the defendant that each separate order was a separate and distinct contract. These orders are consistent with the theory of plaintiff that the delivery of the total amount of the season's requirements were to be accepted by the defendant as required. These requirements were evidenced by the different orders issued from time to time by the defendant. The payments were to be made on the conditions named in the acceptance of the orders. The trial court found that there was a meeting of the minds of the parties as to the general oral understanding or agreement, that the plaintiff was to deliver and the defendant accept all its requirements in the way of condensers for the following seasonal requirements.

The condenser appears to have been built according to the special requirements of the defendant and to have had no general market value. Plaintiff's loss, as found by the trial court, appears to have been based upon the balance due for work and labor in re-making certain condensers returned, and for raw material for parts, and labor in the manufacture of certain uncompleted condensers on hand, plus the profit of the plaintiff

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The following figures are given in the report of the
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1900, showing the total number of persons in the United States
and in the various States and Territories, and the
population of each State and Territory, and the
total population of the United States.

- 6 -

in the event the defendant had taken the complete number of condensers ordered. No claim was allowed for anything more than the number of condensers ordered by the defendant. We see no reason for disturbing the judgment.

For the reasons stated in this opinion, the judgment of the Municipal Court of Chicago, is affirmed.

JUDGMENT AFFIRMED.

RYNER, J. CONCURS;
HOLDEN, J. NOT PARTICIPATING.

33906

HATTIE WOLFSON,

Plaintiff-Appellee,

v.

LOUIS RUBIN, doing business
as RUBIN CONSTRUCTION COMPANY,

Defendant-Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

257 I.A. 641

Opinion filed May 14, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

Plaintiff, Hattie Wolfson, brought her action
against the defendant, Louis Rubin, doing business as Rubin
Construction Company, in an action in damages, because of the
failure of the defendant, a contractor, to build a roof in
a proper and workmanlike manner on a bungalow occupied by
her as a residence. Evidence was introduced on behalf of the
plaintiff showing that the roof, about two years after it
was constructed, was leaking badly. It also appears from the
testimony that it was soggy and warped and part of it had
blown off. There was some attempt on the part of the defendant
to show that this condition was caused by unusual storms. The
contract between the plaintiff and the defendant was introduced
in evidence, from which it appears that the "contractor agrees
to furnish five year guarantee on the roof."

It is insisted on behalf of the defendant that
there is only one question in the case, namely, that the
clause in the contract does not amount to a guarantee.
Independent of this clause, there is sufficient evidence to
sustain the verdict on the ground that the work was not

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properly done. We are of the opinion, however, that the clause in question amounts to a continuing guarantee for the period of five years, by which the defendant agrees that the work and material would remain in good order for that period of time. Erickson v. George W. H. Snodgrass Co., 111 Mass. 311.

Judgment was entered upon the finding of the trial court and we find no reason for disturbing that judgment.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

MEYER, J. CONCURS.
HOLBOM, J. NOT PARTICIPATING.

33918

ALBERT STAUFENBEIL,
Appellant,
v.
EDWIN PALM,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

257 I.A. 642'

Opinion filed May 14, 1930

MR. PRESIDING JUSTICE HILSON delivered the opinion of the court.

Plaintiff, Albert Staufenbeil, filed his statement of claim in the Municipal Court of Chicago, stating that he was engaged by the defendant, Edwin Palm, to procure an exchange of a certain six flat building and four vacant lots for other property of equal value.

Plaintiff charges that he procured a man by the name of James A. Lauletta who desired to exchange certain real estate for the property of the defendant and that the defendant entered into a contract with Lauletta for the exchange of said property; charges further that the defendant subsequently refused to carry out the agreement; that plaintiff is entitled to his commission for services rendered in procuring a person ready, willing and able to exchange property on terms acceptable to the defendant.

Plaintiff introduced in evidence a contract dated March 30, 1928, marked plaintiff's exhibit one, signed by Lauletta and the defendant Palm. It appears that there were some corrections to be made and a second contract was entered into between Lauletta and the defendant Palm which was introduced in evidence and marked plaintiff's exhibit two.

It appears from the record that the property of Lauletta was owned by himself and wife as tenants in common.

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Opinion filed May 14, 1930

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At the end of plaintiff's case the defendant asked for a directed verdict against the plaintiff on the ground that the contract was not signed by Lauletta and his wife, but only by Lauletta and that, as the property was owned jointly by them, the contract was unenforceable and the plaintiff not entitled to recover. On this ground the court directed a verdict in favor of the defendant and judgment was entered for the defendant, from which judgment this appeal has been taken to this court.

Plaintiff wrote a letter to the defendant which, among other things, included the following statement:

"At the end of ten days the deed from Mr. Lauletta and his wife will be ready for exchange and the cash balance due you will be ready also and we will expect you to be ready to go through with the deal at that time."

Plaintiff testified that after the contract was signed he talked to the wife of the defendant and that she stated that she did not want the lots and that she thought the defendant was paying too much for them.. There is nothing in the record to show that any objection was made at any time, until the trial, on the ground that the contract had not been signed by the wife of Lauletta.

The contract, if there was a contract in this case, between the plaintiff and the defendant, should not be confused with a contract between the vendor and the purchaser. The only obligation on the part of the plaintiff was to procure a person, ready, willing and able to exchange property with the defendant which met with the approval of the defendant. This appears to have been done because of the signing of the two agreements. So far as the facts, therefore, are concerned, the plaintiff secured for the defendant a purchaser ready, willing and able to take the property of the defendant on terms acceptable to him. So

far as this record is concerned, there is nothing to show that the wife of Laulette would not have joined in a deed and, as a matter of fact, the inference could be drawn that she was willing, because of the communication contained in the letter of the plaintiff to the defendant dated March 16, 1938, already referred to in this opinion.

So far as the testimony on behalf of the plaintiff is concerned, the only reason given for refusal to go on with the deal was the fact that the wife of the defendant refused to join in a deed because she believed the defendant was not getting a sufficient value for the property which he had contracted to convey. The mere fact that the wife of Laulette, joint owner of the property, did not sign the contract, is not, in and of itself, sufficient to preclude the plaintiff from recovery, until such time as it can be shown that she was unwilling to sign a deed. Johnson v. Stewart & Hay Building Co., 171 Mo. A. 543.

On a motion to direct a verdict, this court should consider every intendment in favor of the plaintiff's case and, if there is any evidence tending to support the position of plaintiff, it should be allowed to go to a jury for their consideration unless, at the end of all the evidence, the testimony is so overwhelmingly in favor of the defendant that all reasonable minds would agree that the plaintiff was not entitled to recover.

It was not essential to recovery in the case at bar that there should be a written contract, if it should be made to appear that the broker had procured a purchaser for the property who was ready, willing and able to perform; consequently, it was not essential that the wife of Laulette should sign a contract if, in fact, she was ready, willing and able to sign

For as this report is concerned, there is nothing in this report
the title of which would not have been in a good way, as a
major of that, the information would be much the same as in the
because of the communication included in the report of the
violation of the contract dated March 10, 1933, already
referred to in this opinion.

As far as the testimony on behalf of the plaintiff
is concerned, the only witnesses are: the plaintiff, the
the fact that the fact that the fact that the fact that the
to join in a good business and business the defendant was not
getting a sufficient value for the property which he had
located in Norway. The court said that the fact that the
joint agent of the property, did not sign the contract, in fact
is not of itself, sufficient to establish the plaintiff's claim
that the plaintiff will lose time as it can be shown that the
plaintiff is also a good business man. The court said that the
VIOLATION OF CONTRACT.

As a matter of fact, the court should
be satisfied every independent in favor of the plaintiff's own
it shows in any evidence tending to support the plaintiff's
claim, it should be said as to the fact that the
organization which, at the end of all the evidence, the
testimony is not conclusively in favor of the plaintiff that
all the evidence which would support the plaintiff's claim
should be removed.

It was not necessary to remove in the case of the
that there should be a sufficient reason, it is not to be
to remove that the court had granted a judgment for the
plaintiff the way to the plaintiff and not in favor of the defendant.
It was not necessary that the fact that the fact that the
plaintiff is, in fact, the fact that the fact that the fact that the

a deed of conveyance and to carry out the agreement. There is testimony in the evidence on behalf of the plaintiff from which the inference could be drawn that the defendant did not intend to live up to his agreement regardless of the fact that the wife of Lauletta had not signed the contract. Spangler v. Pizer, 255 Ill. App. 322.

For the reasons stated in this opinion, the judgment of the municipal court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

RYNER, J. CONCURS.
HOLBOM, J. NOT PARTICIPATING.

A book of essays has been published by the National Council on the Status of Women. It contains 17 essays by leading women writers and is published by the National Council on the Status of Women, 1215 Avenue of the Americas, New York 10, N. Y. The book is available for \$2.50 per copy, plus postage. It is a valuable contribution to the study of the status of women in America.

THE NATIONAL COUNCIL ON THE STATUS OF WOMEN

For the purpose of this study, the National Council on the Status of Women has conducted a series of studies and has found that the status of women in America is still far from equal. The book is a valuable contribution to the study of the status of women in America.

STANDARD PUBLICATIONS AND BOOKS COMPANY

STANDARD PUBLICATIONS AND BOOKS COMPANY
1215 AVENUE OF THE AMERICAS, NEW YORK 10, N. Y.

33328

ALEXANDER LEVIN, Receiver,
Appellee,

v.

ALBERT C. TUMY and MARGARET
I. TUMY,
Appellant.

APPEAL FROM

A MUNICIPAL COURT

OF CHICAGO.

2571 A. 642²

Opinion filed May 14, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

Alexander Levin, plaintiff, brought his action as
receiver, against Albert C. Tumy and Margaret I. Tumy, in
forcible entry and detainer to recover possession of the
premises described as number 423 West 25th street. The trial
was had by the court without a jury, resulting in a finding
and judgment for possession in favor of the plaintiff.

The only witness called was Margaret Tumy, defendant,
and the entire examination was conducted by the court. The
only proof of notice was one found by the defendant, tacked
upon the door, and there is nothing in the record to show
why the notice was not served personally.

The Forcible Entry and Detainer Act, Chapter 57,
Paragraph 3, provides the demand required may be made by
delivering a copy to the tenant or leaving a copy with some
person above the age of 17 years residing on the premises,
or in case no one is actually on the premises, then by
posting same on said premises. The return may be sworn to
by the person serving the same. There is nothing in this
record to show why the defendant was not personally served

REFUGEE STATUS

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Journal of Interpersonal Violence 26(10) 1978-1994

UNITED STATES DEPARTMENT OF AGRICULTURE

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7. I am not a member of any other organization.

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in the United States. There is nothing in this

Source: *Journal of the American Statistical Association*, 1997, 92, 10, 10-11.

with the notice.

The defendant Margaret Tany testified that on April 13rd, the date of the notice which was found upon the door of the premises, she did not owe \$46.00 as rent as claimed in the notice. If such was the fact, and it is the only evidence in the record, then that amount was not due on the date the notice was posted on the door, and the charge stated in the notice, upon which the demand for possession was based, was without foundation.

No testimony was introduced on behalf of the plaintiff, the receiver of the premises, showing that any rent was due and unpaid. The defendants, had lived upon the premises eleven or twelve years. They were entitled to a full hearing, but, from the record, it appears that they were not afforded that opportunity.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

RYNER, J. CONCURS.
HOLDOM, J. NOT PARTICIPATING.

34322

CHICAGO TITLE AND TRUST COMPANY,
Trustee,

(Complainant) Appellee,

v.

TOWER BUILDING CORPORATION, et
al,
(Defendants)

JAMES H. HOOPER,

Appellant.

INTERCOURTORY APPEAL

FROM CIRCUIT COURT,

COOK COUNTY.

257 I.A. 642³

Opinion filed May 14, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

The complainant, Chicago Title and Trust Company, filed its bill in the Circuit Court to foreclose a certain trust deed in which it was named as trustee, against Tower Building Corporation, the owner of the property, and certain other defendants. The bill charges that the Tower Building Corporation issued its trust deed conveying said premises to complainant, as trustee, to secure its indebtedness in the amount of \$450,000, represented by 408 bonds. The property was also subject to a prior incumbrance of \$1,500,000. The trust deed, a copy of which is attached to the bill, contains the usual clauses, giving the trustee the right in case of default to take possession of the property and providing that no holder of any outstanding bonds shall sue in law or in equity for foreclosure of the trust deed without first having made application to the trustee in writing, and then only after failure of the trustee within sixty days to take action. Provides further that the trustee may bring action for foreclosure without possession of the bonds; provides further that the trustee shall be the agent and attorney in fact for each and all of the bondholders for the purpose of foreclosure of the trust deed; provides



Opinion filed May 14, 1910

THE COMMISSIONER OF THE GENERAL LAND OFFICE, WASHINGTON, D. C.,
SIR: I have the honor to acknowledge the receipt of your letter of the 10th inst., and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. The matter is now under consideration and a decision will be rendered as soon as possible. I am, Sir, very respectfully,
Yours very truly,
J. H. [Signature]

THE COMMISSIONER OF THE GENERAL LAND OFFICE, WASHINGTON, D. C.

further that the trustee may act for the bondholders and take title in its name for their benefit.

The bill charges that James H. Hooper, made a party defendant, claims to be the owner of said premises by reason of a bailiff's deed on a judgment of \$800 against the Tower Building Corporation; charges further that the said Hooper is attempting to collect rents under said claim and that complainant fears that the property, which is of scant security, will not be sufficient if the rents are not applied for the benefit of the bondholders. The bill asks for a receiver and for an injunction restraining Hooper from collecting said rents or interfering with the receiver in his operation of the Building.

It appears that the proceeding was regular in all respects. Notice was given concerning the motion for the appointment of a receiver and for the issuance of an injunction. Complainant gave bond as required by the chancellor. The receiver was appointed under a proper order of the court and gave his bond and qualified as temporary receiver. The statute in regard to such a proceeding was strictly followed.

This case comes before us on an interlocutory appeal from an order appointing the receiver. The only point urged for reversal is that the bill should have made each and all of the beneficiaries under the trust deed parties to the proceeding. No answer was filed nor demurrer to the bill, nor any motion made in the trial court to correct this lack of averment in the bill. This court has held that a trial court has the inherent power to appoint a temporary receiver or issue a temporary restraining order, and this court on appeal will not scrutinize the bill for the purpose of finding defects therein, if the statutory requirements have been complied with and the bill on its face shows a probable cause of action.

The purpose of the issuance of such temporary orders by the trial court is to give that court an opportunity to hold matters in stays que until it is able to settle the pleadings, and become more fully advised concerning the litigation .

Friedman v. Peckler, 355 Ill. App. 199; McDougall v. Woods, 347 Ill. App. 170.

From the bill itself, and particularly a copy of the trust deed attached thereto, it is apparent that the complainant is acting as trustee for and on behalf of the bondholders. It is alleged in the bill that there are 906 outstanding bonds. This would indicate a large number of cassius que trust. It is not necessary to name each cassius que trust individually, where they are too numerous to be served, but they may be classed as a group. Ordinarily in a bill they should be named parties, but there is an exception to the rule, namely, where their interest in the litigation is properly represented. In the case at bar the trustee stands as the representative under the trust agreement in the cassius que trust. The Farmers Loan & Trust Co. v. Lake Street Elevated Railroad Co., et al. 173 Ill. 439; Chicago & Great Western Railroad Land Co. v. Peck, et al. 112 Ill. 408; O'Neill v. Wolf, 338 Ill. 508.

The chancellor, upon the bill filed in this cause, properly proceeded to protect the property, and the bill was sufficient to authorize the appointment of a receiver. It is charged in the bill that the defendant Hooper claims to have a sheriff's judgment for \$800. It is apparent that the property in question was improved and of a value in excess of \$1,500,000. The trust deed was a prior incumbrance and should

be protected against this claim, at least until such time as the defendant Hooper should show such interest as he has in the property.

For the reasons stated in this opinion, the order of the chancellor of the Circuit court, appointing a receiver, is affirmed.

ORDER AFFIRMED.

RYNER, J. CONCURS.
HOLDEN, J. NOT PARTICIPATING.

10-10-68

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Received 22 January 1998; accepted 12 February 1998

At the beginning of the 1970s, the world was still very much divided by the Cold War.

• *Journal of the American Medical Association* 281:1211-1212, 1999

1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 2684-2685, 2686-2687, 2688-2689, 2690-2691, 2692-2693, 2694-2695, 2696-2697, 2698-2699, 2700-2701, 2702-2703, 2704-2705, 2706-2707, 2708-2709, 2710-2711, 2712-2713, 2714-2715, 2716-2717, 2718-2719, 2720-2721, 2722-2723, 2724-2725, 2726-2727, 2728-2729, 2730-2731, 2732-2733, 2734-2735, 2736-2737, 27

34340

CHICAGO TITLE & TRUST CO., a Corp.

Complainant,

v.

TOWER BUILDING CORPORATION, JAMES

H. HOOPER, et al,

Defendants,

JAMES H. HOOPER,

Appellant,

v.

HOLMAN D. FETTERSON, Receiver,

Appellee.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT.

COOK COUNTY.

25771.6424

Opinion filed May 14, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is an appeal from an order of the Circuit Court in Chancery, restraining the defendant James H. Hooper from collecting the rents of the Tower Building until further order of the court. The injunction issued was based upon a bill filed by the Chicago Title & Trust Company, as Trustee, for the benefit of certain bond holders under a trust deed issued by the Tower Building Corporation. The same reasons are advanced for a reversal of this interlocutory order as are contained in a previous appeal from an order appointing a receiver and considered and decided by this court in case, General number 34322. The facts are practically the same in this cause as in the proceeding referred to.

For the reasons stated in our opinion in Chicago Title and Trust Company, Trustee, v. Tower Building Corporation, et al, General Number 34322, the order of the Chancellor of the Circuit Court entered in this cause is affirmed.

ORDER AFFIRMED.

RYAN, J. CONCURS,
HOLDON, J. NOT PARTICIPATING.

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Opinion filed May 14, 1933

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25897

MARY KLEEMAN,

Appellee,

v.

BENTON F. KLEEMAN,

Appellant.

APPEAL FROM

SUPERIOR COURT

COCK COUNTY.

257 I.A. 643

Opinion filed May 14, 1930

MR. JUSTICE RYAN delivered the opinion of the court.

On January 28, 1927, the complainant filed her bill for divorce against the defendant. The charge was cruelty. The defendant answered, denying the charge of cruelty, and filed a cross-bill alleging that the complainant had deserted him for the statutory period. On January 21, 1928, the complainant amended her bill so that the relief prayed for was separate maintenance instead of a divorce.

The parties to this litigation were married on February 24, 1902. No children were born of the marriage. They separated on January 9, 1927. Up to the time of the separation they had not co-habited as husband and wife for over twenty-five years. She testified that it was his fault and he testified that it was hers, and that she repeatedly stated that she could not bear children.

Upon the trial of the case the complainant testified that the defendant continually used profane language and that on an average of every month or two he struck and beat her. She testified, in particular, that on April 12, 1926, she broke the yolk of an egg in poaching it and that he became angry, cursed, struck her, and gave her a violent kick on her left leg. She also said that on January 3, 1927, he, in a fit of anger, kicked her on the ankle, causing a painful swelling

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Original filed May 14, 1954

Source: U.S. Census Bureau, *Marriage, Divorce, Remarriage in the 1990s*, p. 10.

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THE UNIVERSITY OF CHICAGO

Journal of Management Education 33(10)

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and that her "whole dress was blood."

The defendant admitted that on or about the dates testified to by the complainant she complained of certain injuries. He said that on April 13, 1936, she complained about running against a chair but that she did not even limp. He further stated that a couple of days prior to January 3, 1937, she said that she hit her ankle against the metal part of the hose on a portable vacuum cleaner. He also said that he had never hit, kicked or slapped her.

Complaint is made because two witnesses were permitted to testify that the complainant exhibited the injuries to her legs to them and said that the defendant was responsible for them. The cause was tried without a jury and the presumption is that the Chancellor considered only competent evidence. That the complainant said, if not competent under the res gestae rule, was admissible for the purpose of rebutting any inference which might arise from her failure to make complaint about the treatment she had received. The testimony as to the bruises was clearly corroborative of the testimony of the complainant to the extent of establishing that she had sustained injuries.

The complainant and the defendant were the only witnesses who gave direct testimony in reference to the commission of acts of cruelty and the causes of the separation. She testified to repeated acts of cruelty and improper conduct on his part. He denied them all. Their testimony is in accord in two respects. They did not cohabit as husband and wife after they had been married two or three years and they were constantly quarreling. The Chancellor found that on January 3, 1937, the defendant absented himself from the complainant and that the complainant was living separate and apart from her husband, without her fault. He saw and heard the witnesses and evidently

Journal of Management Studies, 19(1), 67-80.

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WITNESSES:

was of the opinion that the complainant was telling the truth, we find nothing in the record which would warrant us in disturbing the finding.

The trial court awarded the complainant an allowance of \$145.00 per month for her support. The decree further provided that she should be permitted to continue to occupy the premises formerly occupied by her and her husband without paying rent; that the defendant should pay for all heating fuel and necessary repairs and taxes and assessments upon the premises, and that the defendant should pay to her for her solicitors' fees the sum of \$1,000.00. It is contended that the allowance for her support is excessive and that there was no evidence of the value of the services rendered by her solicitors.

During the first few years of their married life the defendant was engaged in the hardware business. In 1887, he was licensed to practice law. He was a member of the State Legislature of this State for twelve years. At the time he testified he said that he was employed by the City of Chicago to quiet titles to property, for which he was compensated at the rate of twenty-five dollars per day; that he had no practice of his own; that he received \$8,300.00 a year as rentals from all the real estate he owned; that he had about \$8,000.00 in the bank; that a building of his was mortgaged for \$47,000.00, and the obligation was about to mature; that he paid annually \$1,820.00 interest on the mortgage and about \$1400.00 taxes; and that the building referred to needed certain repairs which would cost about \$2500.00.

The complainant testified in detail with reference to her necessary expenses. She was allowed temporary alimony of \$125.00 per month with the right to occupy the home, rent free.

The defendant testified that, during the pendency of the cause, he paid her \$145.00 per month, besides paying for the fuel oil, painting and repairing the property and paying the taxes and special assessments on the premises. The allowance for her support was not excessive.

Counsel for the defendant say that there is no evidence in the record to support the allowance of \$1,000.00 solicitors' fees. The record is barren of any evidence as to the value of the services rendered except what may be inferred from an examination of the pleadings, the testimony, upon the trial of the cause, and orders and decrees entered.

The transcript of record appears to be 408 pages in length but, upon examination, we find that it contains copies of the original bill for divorce and answer to it, which were superseded by subsequent pleadings. It also contains a copy of a decree which was vacated and set aside. There is also incorporated in the transcript two certificates of evidence identical in content, but one purporting to be an original and the other a copy. As appears from the record, the case went to trial on March 30, 1926, and a further hearing was had on March 27, 1928. Howmuch time was consumed on either day in the taking of testimony we do not know. The attorneys appeared in court about one year later for the purpose of having the terms of the final decree settled.

There is no testimony as to services rendered either in or out of court. The decree contains no finding as to what, in the opinion of the Chancellor, would be a reasonable and customary fee. There are isolated cases where a revising court had declined to reverse a decree because of the lack of evidence to support an allowance of solicitor's fees. Such was the case in Jones v. Jones, 111 Ill. App. 384. But there the fee allowed was \$25.00, and the court held that it was so

small as to be fairly considered nominal.

In the event that any greater than a nominal amount is allowed for solicitor's fees by the trial court, the evidence produced to support the allowance should be in the record so that, in the reviewing court, the party who is obligated to pay, may have a hearing upon the facts. In the instant case we can only conjecture as to what the trial court considered in fixing the amount of fees. The proper procedure is as stated in Gehlbach v. Gehlbach, 218 Ill. App. 503, where the court said:

"The allowance of \$100 as alimony to pay appellee's solicitor's fees on the hearing of the action for increase of alimony and of \$100 to pay her solicitor's fees on appeal, while proper on a proper state of facts (Stillman v. Stillman, 98 Ill. 126; Ozarr v. Ozarr, 128 Ill. App. 430), cannot be upheld in this case. The rule of law is that the value of such services must be established by proof and that such proof must be preserved in the record, or the decree must show that such evidence was in fact introduced, and that upon a consideration thereof the court found that such fees were reasonable, customary and usual fees for such services. Garrett v. Garrett, 180 Ill. App. 513; Glynn v. Glynn, 139 Ill. App. 185; Cash v. Cash, 180 Ill. App. 37; McMullen v. Reynolds, 309 Ill. 504; Munter v. Munter, 121 Ill. App. 388. There is neither evidence in this record nor finding in this decree as to what the services rendered and to be rendered for which the two \$100 items were allowed were reasonable, customarily and ordinarily worth in Logan County."

The court erred in allowing solicitors fees without requiring proof and the decree to that extent is reversed, but in all other respects it is affirmed and the cause is remanded, for the purpose of permitting proof of the value of complainant's solicitor's fees to be taken and the amount determined.

DECREE AFFIRMED IN PART AND
REVERSED AND REMANDED IN PART.

WILSON, P.J. CONCURS,
HOLDEN, J. NOT PARTICIPATING.

Sutton, Richard L. 2007. pgs. 2-11. Power and

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THE COURT STAYS IN RECESS UNTIL 10:00 A.M. MONDAY, SEPTEMBER 11, 2001.

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35806

HENRY E. GIFFORD,

Appellee,

v.

KENOC MANUFACTURING COMPANY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

25711. 343²

Opinion filed May 14, 1930

MR. JUSTICE RYER delivered the opinion of the court.

The plaintiff was employed by the defendant to procure a contract from the City of Detroit for the purchase from the defendant "Stop" and "Go" street signal equipment. There were some preliminary negotiations between the parties, but as we view the situation, these were merged in a letter written by the defendant to the plaintiff under date of April 11, 1928, which reads:

"Mr. H. E. Gifford,
304 Ford Building,
Detroit, Mich.
Dear Sir:

Confirming our conversation held with you recently while in our Chicago office, we wish to state that we will turn over to you the City of Detroit on an exclusive basis insofar as the sale of Kenoc Stop and Go Signalling equipment is concerned. The period of this agreement to be until such time as it shall have been definitely determined as to who shall be allotted the contract which is under consideration at the present time and if you are successful in securing this business, this agreement shall be perpetuated.

Your compensation or commission, as we prefer to call it, shall be 25% of the price at which the equipment is sold to the city of Detroit, payable upon receipt of remittance from the municipality.

At the out-set, we will be willing to supply you with a reasonable amount of expense money to offset the time spent by you on an initial trip to Detroit in order to determine as to whether or not it will be possible to figure this particular job. Any subsequent trips necessary on your part would of course be financed by yourself.

We believe that this covers all points having to do with the memoranda of agreement but if for any reason we have omitted any particular points which come to your

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• **UNITED STATES**

• *Calligraphy*

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Optimoulted May 14, 1930

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The attached was reviewed by the Bureau of the Census and approved for release to the public on 10/1/77.

1. *Staphylococcus aureus*

100-442100-1000
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Now the film captures the national
state of mind in America during the 1930s
and shows the way in which the life of the
people was changed by the economic depression.
The film is a masterpiece of photography and
editing. It is a film that should be
seen by every American citizen. It is a
film that should be shown in every school
and every public place. It is a film
that should be shown to every foreigner
who comes to America. It is a film
that should be shown to every American
who is proud of his country.

[The following information was obtained from a review of the files of the Federal Bureau of Investigation.]

at night and the following day the same was repeated. The results were as follows: The first day the temperature was 70° F. and the second day it was 72° F. The third day it was 74° F. and the fourth day it was 76° F. The fifth day it was 78° F. and the sixth day it was 80° F. The seventh day it was 82° F. and the eighth day it was 84° F. The ninth day it was 86° F. and the tenth day it was 88° F. The eleventh day it was 90° F. and the twelfth day it was 92° F. The thirteenth day it was 94° F. and the fourteenth day it was 96° F. The fifteenth day it was 98° F. and the sixteenth day it was 100° F. The seventeenth day it was 102° F. and the eighteenth day it was 104° F. The nineteenth day it was 106° F. and the twentieth day it was 108° F. The twenty-first day it was 110° F. and the twenty-second day it was 112° F. The twenty-third day it was 114° F. and the twenty-fourth day it was 116° F. The twenty-fifth day it was 118° F. and the twenty-sixth day it was 120° F. The twenty-seventh day it was 122° F. and the twenty-eighth day it was 124° F. The twenty-ninth day it was 126° F. and the thirtieth day it was 128° F. The thirty-first day it was 130° F. and the thirty-second day it was 132° F. The thirty-third day it was 134° F. and the thirty-fourth day it was 136° F. The thirty-fifth day it was 138° F. and the thirty-sixth day it was 140° F. The thirty-seventh day it was 142° F. and the thirty-eighth day it was 144° F. The thirty-ninth day it was 146° F. and the fortieth day it was 148° F. The forty-first day it was 150° F. and the forty-second day it was 152° F. The forty-third day it was 154° F. and the forty-fourth day it was 156° F. The forty-fifth day it was 158° F. and the forty-sixth day it was 160° F. The forty-seventh day it was 162° F. and the forty-eighth day it was 164° F. The forty-ninth day it was 166° F. and the fiftieth day it was 168° F. The fifty-first day it was 170° F. and the fifty-second day it was 172° F. The fifty-third day it was 174° F. and the fifty-fourth day it was 176° F. The fifty-fifth day it was 178° F. and the fifty-sixth day it was 180° F. The fifty-seventh day it was 182° F. and the fifty-eighth day it was 184° F. The fifty-ninth day it was 186° F. and the sixtieth day it was 188° F. The sixty-first day it was 190° F. and the sixty-second day it was 192° F. The sixty-third day it was 194° F. and the sixty-fourth day it was 196° F. The sixty-fifth day it was 198° F. and the sixty-sixth day it was 200° F. The sixty-seventh day it was 202° F. and the sixty-eighth day it was 204° F. The sixty-ninth day it was 206° F. and the seventieth day it was 208° F. The seventy-first day it was 210° F. and the seventy-second day it was 212° F. The seventy-third day it was 214° F. and the seventy-fourth day it was 216° F. The seventy-fifth day it was 218° F. and the seventy-sixth day it was 220° F. The seventy-seventh day it was 222° F. and the seventy-eighth day it was 224° F. The seventy-ninth day it was 226° F. and the eightieth day it was 228° F. The eighty-first day it was 230° F. and the eighty-second day it was 232° F. The eighty-third day it was 234° F. and the eighty-fourth day it was 236° F. The eighty-fifth day it was 238° F. and the eighty-sixth day it was 240° F. The eighty-seventh day it was 242° F. and the eighty-eighth day it was 244° F. The eighty-ninth day it was 246° F. and the ninetieth day it was 248° F. The ninety-first day it was 250° F. and the ninety-second day it was 252° F. The ninety-third day it was 254° F. and the ninety-fourth day it was 256° F. The ninety-fifth day it was 258° F. and the ninety-sixth day it was 260° F. The ninety-seventh day it was 262° F. and the ninety-eighth day it was 264° F. The ninety-ninth day it was 266° F. and the hundredth day it was 268° F.

kind, please do not hesitate to bring this matter to our attention.

Very truly yours,
C. A. Ward
Sales Manager
Kasco Manufacturing Co.
'Pioneer Buildings of
Guaranteed Traffic Equipment.' "

The principal business of the defendant was assembling the parts constituting signal equipment. The parts were manufactured by outside concerns. The lenses used were made by the Hackett-Evans Glass Company. They were made and shipped in large quantities so that the defendant could have them on hand regardless of any particular order or orders it might have to furnish signal equipment.

The plaintiff encountered difficulty in obtaining the desired contract because the authorities of the City of Detroit objected to the lenses used by the defendant. After certain negotiations they agreed that lenses made by the General Electric Company would be acceptable. A combination bid of the defendant and the General Electric Company was accepted. The equipment was installed. In so doing, the defendant purchased lenses from the General Electric Company at a cost of \$9,021.38. The principal issue for our consideration is whether the trial court erred in entering a judgment, based upon the verdict of a jury, allowing a commission on this sum to the plaintiff. The defendant sold goods to the General Electric Company at a price of, approximately, \$9,000.00, which were used by that company in performing its part of the contract with the City of Detroit. Upon this sum the plaintiff was allowed a commission.

Counsel for the defendant, in their brief, says

"The main issue in this case was whether or not the contract between the parties, as outlined either in whole or in part in the letter from the defendant to the plaintiff dated April 11, 1925 (Plaintiff's Exhibit 2), was changed and modified by the subsequent parole agreement or the actions of the parties."

and further, that:

which, please do not hesitate to bring this matter to our

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a very important document, as it is the first official communication from the President to the Congress since the inauguration of Abraham Lincoln. The letter discusses the state of the Union and the challenges facing the country at the time.

the wife would still remain the wife

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. I am not a member of the Communist Party of the United States of America.

0-18796-1-1

Abstract: This paper discusses the role of the state in the development of the private sector in the context of the transition from a centrally planned to a market economy. It argues that the state should play a role in creating a favorable environment for private enterprise, but should not be directly involved in the management of the economy. The paper also discusses the importance of privatization and the role of the state in the process.

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For a complete list of items tested, see Appendix 1 in the online version of this article.

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"That part of the commission paid him which was derived from the sale of goods to the General Electric Company was not specifically covered by the letter of April 11th. We therefore maintain that the letter of April 11th did not contain the full terms of the contract between the parties and the subsequent actions of the parties should be binding upon the court."

The first point urged as a ground for reversal of the judgment of the trial court is that there was error in excluding the evidence regarding the substitution of lenses used in the equipment as finally sold to the City of Detroit. We are not advised by the brief exactly what ruling of the court is complained of and no reference is made to any of the pages of the voluminous abstract. We conclude, from a reading of the abstract, that the point intended to be made is that the trial court struck out the testimony of one of the defendant's witnesses to the effect that the plaintiff said that the change of lenses was satisfactory to him. This ruling was not prejudicial to the defendant. The plaintiff was employed under an agreement which did not specify any particular kind of lenses. He was to get a contract acceptable to his employer. This he did. He had nothing to say about the kind of equipment to be furnished.

The next contention of counsel for the defendant is that there was error in excluding evidence of the value of the lenses furnished by the defendant as a part of the equipment sold by it to the City of Detroit. The point is untenable. The defendant agreed to pay a commission of 25% of the price at which the equipment was sold to the City of Detroit. If there was no modification of the contract the cost of the lenses was wholly immaterial. It is evident that the jury found that the plaintiff did not consent to any change in the contract. What verdict they would have rendered if they found otherwise is of no consequence.

The next two points stated in the brief refer to alleged errors in the giving of instructions. The trial court

charged the jury orally. It does not appear that counsel for the defendant made any objection to any instruction given by the court. The record indicates the contrary. Accordingly the question of the ruling of the court in giving instructions is not before us.

The last point urged as a ground for reversal is that "the verdict and judgment are against the weight of the evidence and the law."

The substantial point in controversy is whether the plaintiff agreed to waive his commission on the license purchased from the General Electric Company. He says that he did not. Two witnesses for the defendant say that he did. The verdict of the jury and the judgment of the court were in his favor and we find no grounds in the record which would warrant us in holding that the verdict was against the manifest weight of the evidence or the judgment erroneous.

There is much discussion in the briefs about a few hundred dollars of expense money which the plaintiff received. As we construe the letter of April 11, 1935, the defendant agreed to pay promotional expenses to the plaintiff for his initial trip to Detroit. Subsequent trips were to be financed by the plaintiff.

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

RILSON, F.J. AND HOLBOM, J. CONCUR.

13615

EDMUND M. SMITH,

Appellant,

v.

CENTRAL FURNITURE PACKING COMPANY,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

257 L.A. 113

Opinion filed May 14, 1930

MR. JUSTICE RYDER delivered the opinion of the court.

In December 1925, the plaintiff, being about to move, with his family, from Chicago to Pittsburg, Pennsylvania, stored his household goods and furniture in the warehouse of the defendant, which was located at 1108 South Michigan Boulevard, in Chicago. On January 20, 1926, a fire occurred in the warehouse. It is undisputed that the property of the plaintiff was badly damaged by fire and water.

On May 20, 1926, the plaintiff filed his statement of claim in the Municipal Court of Chicago in which he charged that, through the fault of the defendant, he sustained damages to the extent of \$3,000.00. The statement, after setting out the facts as to the storage of the goods, alleged that, when the goods were stored, it was agreed that the defendant would place insurance in the amount of \$1,000.00 on them, which it failed to do; that only a part of the furniture was returned to the plaintiff and that the part so returned was damaged by fire and water.

The defendant's affidavit of merits is in substance a denial of the making of any agreement to place any insurance upon the goods, while they were in storage, and a further denial of any negligence or fault on the part of the defendant in the care of the goods either before or after the fire.



UNITED STATES DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY
WASHINGTON, D. C.

U. S. PATENT OFFICE

Opinion filed May 14, 1930

THE UNITED STATES DEPARTMENT OF AGRICULTURE

IN REPLY TO THE REPORT OF THE COMMISSIONER OF PLANT INDUSTRY

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William E. Miller was called as a witness by the plaintiff for the purpose of examination under Section 38 of the Municipal Court act. He testified that he was an official of the defendant company, which was engaged in the business of packing and shipping of household goods, that the goods, were stored in a brick building, with steel shutters on the elevator shafts and steel doors and that the building was of heavy mill construction on the inside. He further stated that the defendant occupied only three floors of the building; that next to the elevator shaft were steel doors where the stairs led up to each floor; that there was no sprinkling system or catchbasin on the floors occupied by the defendant and that the goods of the plaintiff were placed in open storage, i. e., there were no partitions separating the goods of the plaintiff from those of other customers.

The plaintiff testified that, in making arrangements for the storage of the goods, he communicated with the defendant, Central Furniture Packing Company, by telephone, and upon being assured that its facilities were adequate, he "asked them about placing insurance and they said they could do that."

Subsequent to this telephone conversation, the defendant, under date of November 25, 1925, wrote a letter to the plaintiff, the material portion of which is as follows:

"This will confirm our approximate estimate of \$189.75 for the packing, crating, carting, and Freight Charges on 5000 pounds of household goods as listed with our agent. Goods to be shipped at the declared valuation of \$10.00 per Cwt. Chicago to Pittsburgh, Pa.. This includes, all material and labor and everything necessary for the entire transaction. Two days to pack the goods, and about 4 days in transit or ready for delivery. Extra insurance can be had for \$.75 per one hundred dollar valuation."

On December 17, 1925, the plaintiff replied by letter which is in part as follows:

"This will confirm my conversation with your office this morning. Please call at 12:00 noon on Friday, December 18, at my home, 8246 Dorchester, second floor, and get my household goods.

These goods are to be packed and held in storage until I notify you to ship, which will be from two weeks to two months.

Your man went over the apartment before he made your estimate of \$189.75 for packing, crating, and shipment to Pittsburgh, so I assume that estimate is accurate and represents the approximate amount you will charge. In addition, please place \$1,000.00 insurance, which you quote at \$7.50 a thousand. I understand your charge for storing the goods is \$7.00 a month, or pro rata for other periods."

On February 3, 1936, the defendant sent a letter to the plaintiff, advising him of the fire which had occurred three days previously. The plaintiff came to Chicago on the 5th or 10th of February, 1936. He testified that he asked Miller what he had done about salvaging the goods and that Miller replied that he had done nothing but would try to do something in a few days. He further testified that on the day he talked to Miller, he went to the warehouse and that:

"Everything was just exactly, apparently, as the firemen had left it. It was all water soaked, and no effort had been made to reclaim anything."

On cross-examination he said that he knew nothing about insurance rates on household goods either in storage or in transit; that when, in November 1935, he talked over the telephone to someone in the office of the defendant, he made some mention of insurance but couldn't say what was said about the matter except that "it would be covered when they made a quotation." Finally he was interrogated by the court, the questions and answers being as follows:

"The Court: I will ask a couple or three questions here. Your deal with this furniture company was to have them pack and ship your goods entirely, or was it a question of storing your goods until they should at some future date receive shipment orders; what was the transaction?

A. It was a question of packing them and storing them until they were ready to be shipped, then shipping them at my request.

Q. Was that insurance on the goods while they were in transit or was that insurance on the goods while

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they were in storage? A. It didn't make any difference to me where they were. I wanted them to cover fire insurance while the goods were in their possession."

Counsel for the defendant then asked him if the defendant ever said to him that the insurance would cover the goods while in its possession and the reply was,

"They didn't make any detailed explanation of insurance."

Miller took the witness stand on behalf of the defendant and with reference to the question of insurance said that the estimate given to the plaintiff was for packing, crating, cartage and freight charges to Pittsburgh and that:

"There was no conversation about insurance. The rate for transit insurance covering the goods while in transit from one city to another is \$7.50 per \$1,000.00. That covers insuring loss or damage to furniture from any cause. It does not cover insurance while in storage."

This testimony was objected to on the general ground that it was immaterial.

Miller further testified as follows:

"To get the lowest freight rate the railroad companies desire that we place a valuation of \$10 a 100 on the furniture; knowing in case of wreck or anything \$10 a 100 will not cover the value of the furniture, we make that statement pertaining to \$10 a 100 in the letter and also specify additional insurance can be had at an additional rate of \$7.50 per 1,000, and that is why we mentioned the insurance in this letter, purely transit insurance."

He also stated that transit insurance covers the goods from the time they are received by the railroad company until forty-eight hours after their arrival at destination.

As to the origin of the fire he said that he had no knowledge. He stated that the defendant occupied three floors of a seven story building; that it had fire extinguishers and fire axes on the floors and that there was a water pipe which ran up the fire escape. He also testified that the fire occurred about five o'clock in the evening; that he left the building

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at about two o'clock in the afternoon and that there was nobody on the premises after about three o'clock in the afternoon. There were no electric lights or kerosene lamps upon the premises.

He further testified that the building was inspected on an average of about four times a year by the fire department; that almost every time the defendant requested insurance on the contents the Board of Underwriters inspected the premises; that the defendant had placed on some of the property in storage insurance aggregating in amount \$100,000.00; that the contents of boxes and barrels stored were never known to the witness so that he did not know whether they contained combustible materials; that the fire started about twenty feet away from the plaintiff's furniture; that he was at the building twenty minutes after it started and that he gained entrance by climbing up the fire escape and passing through a window and that the firemen had the fire under control within an hour after it was discovered, but that some of them remained there for three days afterwards;

Miller gave as a reason for leaving the furniture of the plaintiff untouched from the time of the fire until February 9, that "we wanted the men who owned the furniture to be there and assist in telling us what belonged to him" and that "we didn't want to touch any person's furniture until we knew the man was coming there, because marks had been washed off the barrels and boxes and our lists had been destroyed and it would be a much simpler matter for the men who owned the furniture to be there and assist us by telling us what belonged to him." He further stated that he and employees of the defendant had been removing other lots of furniture, before the plaintiff arrived, "trying to do everything we could to save what we could."

at about 200 paces in the afternoon and that there was
nobody on the premises after 10:00 p.m. in the
afternoon. There were no electric lights in the house
when the premises.

An officer testified that the witness was requested
on an average of about 100 times a year by the City
that almost every time the witness was requested to
the witness the house at 10:00 p.m. was requested to
that the defendant had entered on one of the premises in
the witness's apartment in 1931 and that the
contents of boxes and suitcases which were found in the
apartment at that time had been searched and examined and
nothing was found there. The witness testified that he
was from the witness's apartment and that he had been
twenty minutes after it started and that he had been
of climbing up the fire escape and passing through a window
and that the witness had the fire escape window open and
from 1931 it was destroyed, but that some of them remained
there for about two or three years.

Witness gave as a reason for leaving the premises of
the witness's apartment from the time of the fire until January
9, that he wanted to see the house and the furniture to be there
and wanted to tell him that he belonged to him. The witness
didn't want to touch any person's furniture until he knew the
man was coming there, because he was not sure of it.
The witness and some of his friends had been drinking and it
would be a much longer matter for him and the other two friends
to be there and asked to be telling him that he belonged to him.
The witness stated that he was very drunk at the time and had
been drinking about 100 paces of furniture, before the witness
called, "I'm going to be sleeping so would you have to go."

The plaintiff made out a prima facie case by showing that his goods, in good condition, were stored in the warehouse of the defendant, as a bailee for hire, that only a part was returned to him, on demand, and that the goods so returned were in a damaged condition. The burden was then placed upon the defendant to produce evidence showing or tending to show that it was free from negligence. We think that the facts and circumstances proved upon the trial were sufficient to meet or overcome the prima facie case made by the plaintiff.

A more difficult question arises with reference to the care of the goods after the fire, but we are of the opinion that there was sufficient evidence introduced to warrant the trial judge in finding that the defendant was not derelict in its duty in this respect. The fire occurred on the evening of January 30, 1936. Some of the firemen remained on the premises until February 3, 1936. On that day the defendant advised the plaintiff by letter that his goods had been badly damaged by fire and water. The plaintiff admitted that he received the letter on February 4, 1936, but he did not come to Chicago until the 8th or 10th of that month. In the meantime he did not advise the defendant by letter or telegram what disposition to make of the goods. In addition, there was no specific proof, and, by the nature of things, there could be none, as to the extent of the damage caused solely on account of the goods remaining in a water-soaked condition from the date of the fire until they were removed.

As to the matter of insurance the plaintiff said that he had an oral understanding that the goods were to be insured while in storage. On cross-examination, however, he stated that he could not tell what was said about the subject. The president of the defendant company testified that he knew of no conversation about or order for insurance. In its letter of November

25, 1925, the defendant stated, in part:

"Goods to be shipped at the declared valuation of \$10.00 per Cwt. Chicago to Pittsburg, Pa.

This includes, all material and labor and everything necessary for the entire transaction. Two days to pack the goods, and about 4 days in transit or ready for delivery. Extra insurance can be had for \$.75 per one hundred dollar valuation."

Over objection, Miller testified that, in shipping furniture, the defendant placed a valuation of \$10.00 per 100 pounds in order to get the lowest freight rate and that, knowing, that in case of a wreck or other damage, the loss would probably exceed the valuation placed upon the goods, the defendant advised its patrons that additional transit insurance could be obtained at the rate of \$7.50 per \$1000.00 of value. If the letter of November 25, 1925 is ambiguous then this testimony was competent. But, as we view the matter, the witness interpreted the letter as it should be. The writer had just mentioned the valuation to be placed on the goods while in transit, which would fix the maximum liability of the railroad company, and then suggested that extra insurance could be had at \$.75 per one hundred dollar valuation." No mention was made of any other insurance. The reasonable interpretation to be given the letter is that the writer by the use of the expression "extra insurance" meant coverage of risk over and above the amount for which the railroad company would be liable.

The plaintiff in his letter of December 17, 1925, refers to the estimate contained in the defendant's letter of November 25, 1925, quoting the estimate for packing, crating and shipping to Pittsburg and then says:

"In addition, please place \$1,000.00 insurance, which you quote at \$7.50 a thousand."

There is no evidence of any quotation of insurance rates by the defendant except that contained in its letter of November 25, 1925. As stated above, that quotation evidently referred to the rate of insurance upon the goods, while in transit.

SECRET, Defense Information, 1971, 25

1. The following information was obtained from the records of the Bureau of Customs and Border Protection, U.S. Department of Homeland Security, regarding the entry of goods into the United States:

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1. The first part of the report is a general statement of the purpose of the study and the objectives to be achieved. This part should be brief and to the point, and should state the scope of the study and the limitations of the study.

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THE UNIVERSITY OF CHICAGO PRESS

1. The estimate of the number of persons in the United States who are in the armed forces is 1,000,000. This estimate is based on the number of persons in the armed forces in 1960, which was 1,000,000. The estimate is based on the number of persons in the armed forces in 1960, which was 1,000,000.

Under Amendment No. 10, it was noted, "while it is recommended that the Commission be authorized to conduct such studies as it may deem necessary, it is recommended that the Commission be authorized to conduct such studies as it may deem necessary."

1.0.7. STANDARD is defined as follows: The standard is a set of

It may be noted here, that evidence relating to the

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago, in favor of the defendant, is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. CONCURS,
HOLDOM, J. NOT PARTICIPATING.

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33637

SAMUEL P. LUERO,

Appellee,

v.

WILLIAM WALLACE RICE, Trading
as Bill Rice Productions,

Appellant.

93
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2011A.043⁴

Opinion filed May 14, 1930

MR. JUSTICE HYMAN delivered the opinion of the court.

On December 20, 1928, the plaintiff brought suit in the Municipal Court of Chicago to recover damages for the breach of a written contract. The document is a lengthy one but the substance of it is as follows:

1. It recites that the plaintiff is desirous of raising funds for "certain legitimate purposes" and that the defendant proposes to furnish the merchandises "to be used in the said fund raising campaign."

2. The defendant agrees, in consideration of the purchase from him of the merchandises, to place at the disposal of the plaintiff the defendant's financial, merchandising and theatrical facilities.

3. The defendant agrees to conduct in Chicago an entertainment for a period of three days, commencing December 20, 1928, and ending December 22, 1928, "or any other dates as may be mutually agreed upon."

4. The defendant agrees, at his own expense, to furnish all printing, letters, envelopes, postage and books of admission tickets. He further agrees to furnish, without cost to the plaintiff, all talent, features and contents for the entertainment. The plaintiff agrees to provide a suitable place for giving the entertainment.

5. The plaintiff is to be paid a commission for the sale of admission tickets.

The plaintiff brought suit under a provision in the contract that if he sold less than 2500 "completed books of tickets, totalling \$25.50 each" he was to receive \$2.50 per book. The contract further provided that if the plaintiff cancelled the contract he was to reimburse the defendant for all expenses incurred in the plaintiff's behalf.

The plaintiff attached to his statement of claim a copy of the contract and alleged in general terms a performance on his part. He further alleged that, on December 16, 1938, the contract was changed and modified in writing, so as to provide for an entertainment for one evening only and that to be held on Saturday night, December 23, 1938, at the Coliseum; that he sold 513 1/2 books of tickets for which he was entitled to receive the sum of \$1027.00 and that the defendant received and retained donations in the amount of \$433.75, of which the plaintiff was entitled to one-half.

The third affidavit of merits of the defendant, the sufficiency of which is in question, is abstracted as follows:

"Paragraph 3 thereof, admits that there were 513 1/2 books sold but denies that there is due plaintiff \$2.50 per book or any sum whatsoever because of plaintiff's failure and refusal to fulfill the terms of the contract sued upon, and specifically sets up the manner in which plaintiff failed and refused so to do; and further sets up that the plaintiff repudiated his agent's signature and subsequently in writing, cancelled said contract.

Paragraph 4 admits that the donations received amounted to \$433.75 but denies that 50 per cent or \$216.87 is due the plaintiff, for the reason that these donations were all in the form of checks made payable to the plaintiff and that he has refused to endorse them, and that they are still in the possession of the defendant, their having never been deposited, and for the further reason that the \$433.75 was not the net amount collected, \$120.12 having been spent.

Paragraph 5 of said affidavit of merits alleges that defendant, at the request of the plaintiff, engaged an orchestra at the cost of \$195 and that plaintiff has refused and failed to repay him.

6. The plaintiff is to be paid a reasonable fee

for the services rendered.

The plaintiff has not made a statement in the

affidavit that he has been paid any money for his

services, and the plaintiff has not been paid any money

The plaintiff has not been paid any money for his

services, and the plaintiff has not been paid any money

for the services rendered.

The plaintiff has not been paid any money for his

services, and the plaintiff has not been paid any money

for the services rendered.

The plaintiff has not been paid any money for his

services, and the plaintiff has not been paid any money

for the services rendered.

The plaintiff has not been paid any money for his

services, and the plaintiff has not been paid any money

for the services rendered.

There is no doubt.

The plaintiff has not been paid any money for his

services, and the plaintiff has not been paid any money

for the services rendered.

The plaintiff has not been paid any money for his

services, and the plaintiff has not been paid any money

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The plaintiff has not been paid any money for his

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The plaintiff has not been paid any money for his

services, and the plaintiff has not been paid any money

for the services rendered.

The plaintiff has not been paid any money for his

services, and the plaintiff has not been paid any money

Paragraph 6 of said affidavit of merits alleges that at the request of the plaintiff, defendant paid the salary of one of plaintiff's employees and that the sum so paid (\$125) was not repaid.

Paragraph 7 of said affidavit of merits again denies that plaintiff complied with the provisions of the contract sued upon and further sets up that the plaintiff failed and refused to comply with said contract and sets up in detail the manner in which plaintiff failed to comply.

Paragraph 8 sets up that the defendant, on the strength of the contract sued upon, invested thousands of dollars and because of plaintiff's failure and refusal to comply with the terms thereof, he lost thousands of dollars.

Paragraph 9, defendant denies being indebted to the plaintiff in the sum of \$1,243.87 (amount sued for) or any sum whatsoever."

The trial court struck from the files paragraphs five and six of the affidavit of merits and entered judgment in favor of the plaintiff for \$1,037.00, being the amount alleged to be due for commissions on the sale of tickets. Jurisdiction was reserved to determine the plaintiff's right to receive one-half of the donations.

The plaintiff in his statement of claim alleged that, by a writing dated December 16, 1938, the contract between the parties was so modified as to provide for only one entertainment instead of three. The defendant denied that the contract was modified, as alleged by the plaintiff, but said that, prior to December 19, 1938, the plaintiff verbally repudiated the contract and denied the authority of the party purporting to sign the contract as his agent; that on December 19, 1938, the plaintiff in writing, cancelled the contract and, four days later, repudiated the contract by sending a letter to the defendant giving instructions to conduct an entertainment for one night only, instead of three.

Both parties, by their pleadings concede that a written communication passed between them on December 16, 1938. The plaintiff, although claiming that it constituted a modification

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2025 RELEASE UNDER E.O. 14176

[illegible]

A 40-year-old male

1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 2689-2690, 2691-2692, 2693-2694, 2695-2696, 2697-2698, 2699-2700, 2701-2702, 2703-2704, 2705-2706, 2707-2708, 2709-2710, 2711-2712, 2713-2714, 2715-2716, 2717-2718, 2719-2720, 27

of the contract, did not attach a copy of it to the statement of claim, nor did he allege the substance of it. He did allege that the writing constituted an agreement between the parties. The defendant did not set out the writing or its substance, but stated the conclusion that its legal effect was to repudiate the contract. The plaintiff did not specifically allege and the defendant did not admit that he (the defendant) agreed that the number of entertainments should be reduced from three to one. Neither party alleged that any entertainment was held. The plaintiff pleaded performance of the contract in general terms. The defendant in like language denied performance on the part of the plaintiff.

The pleading of neither party is as specific as it should be, but we are of the opinion that the averments contained in the affidavit of merits are sufficient to join issue on the merits of the cause with those contained in the statement of claim and that the trial court should have heard the cause on the facts. With reference to paragraphs five and six of the affidavit of merits, they should have been more specific, but we consider them to be sufficient to apprise the plaintiff of the alleged breach or cancellation of the contract by the plaintiff.

Finally it urged that the defendant waived the right, on appeal, to question the court's ruling in striking paragraphs five and six of his third amended affidavit of merits from the file, because he asked leave of court to file a fourth amended affidavit of merits. Harris v. Ellis, 309 Ill. App. 401, is cited in support of the contention. In that case the court did so hold, in giving one of a number of reasons for affirming the judgment of the trial court, but we cannot agree with the ruling. Three cases are cited in support of the opinion. In one case the defendant pleaded to a count in a declaration after denial

of a motion to strike out alleged surplusage in the pleading. In one of the other cases the defendant asked for and was given leave to file an amended affidavit of merits. It does not appear whether he complied with the order. In the third case the defendant was given leave to amend his affidavit of merits upon terms, and he failed so to do. In the instant case the trial court refused to grant leave to amend, with or without terms. If the defendant had been given leave to amend, it might be said that he acquiesced in the ruling of the court which he seeks to have reviewed here.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded with directions to vacate the order entered on March 19, 1929, striking paragraphs five and six of the affidavit of merits from the files, and to proceed in conformity with the views expressed in this opinion.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

WILSON, F.J. CONCURS,
HOLDEN, J. NOT PARTICIPATING.

at a meeting to discuss the situation in the district. It was decided that the committee should be organized to look into the matter and report back to the next meeting. The committee was composed of the following members: [names redacted]. The committee was instructed to report back to the next meeting on or before [date redacted].

The subject of the municipal court of Chicago is discussed and the court is recommended as being the best of its kind in the city. The court is recommended as being the best of its kind in the city.

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

34115

JOHN RYBICKI, Administrator of
the Estate of Wladyslawa M. Rybicki,
Deceased,

Appellant,

vs.

FRANK DANIEL and BARBARA DANIEL,
Appellees.

SEVENTH JUDICIAL CIRCUIT

COURT OF APPEALS

257 A. 343

MR. PRESIDING JUSTICE MCGURRY
DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from the judgment that he take nothing entered after trial by the court of a suit upon a promissory note for \$4500.

Defendants executed two promissory notes, payable to the order of Wladyslawa M. Rybicki, one for \$4500 dated January 1, 1926, payable on demand, with interest, and a second note for \$5000 dated January 21, 1926, due 12 months after date, with interest. Each of these notes contained a power of attorney to confess judgment and judgment was entered on the first note amounting to \$5193.75, and on the following day judgment by confession was entered on the second note for \$5398. This judgment on the second note is not questioned on this appeal. Subsequently, on petition of defendants, they were given leave to defend. Their petition, which was ordered to stand as an affidavit of merits, asserted that the second note for \$5000 was given in payment of and extinguished the first note for \$4500. This issue was tried by the court, which found in accordance with defendants' claim and vacated and set aside the judgment on the first note, holding that it was paid by the second note.

Wladyslawa M. Rybicki had procured a divorce from John Rybicki some eleven years prior to her death. She left two minor children who are her heirs. Rybicki saw her only three or four times in the eleven years after the divorce and knew nothing whatever of

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WILLIAM DE WILKINS, JR. - London and in Germany 1941-42

1. Chlorophyll is the green pigment found in plants which captures light energy and converts it into chemical energy through the process of photosynthesis.

1. The following, written by David T. L. on 10/23/81, is a copy of the letter.

1. The following information was obtained from the records of the Bureau of the Census, Washington, D.C., for the year 1960:

NOTE: This page was added in the original.

There are two further important observations with respect to the

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy.

1994-1995

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1914

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

10. The following information is being furnished to you for your information only and is not to be used for any other purpose.

her business but after her death he was appointed administrator and claiming to have found these two notes signed by defendants had judgment entered upon them. Whether or not the second note given was intended to pay and take up the first note must be determined by the credibility of the witnesses, as there is contradictory and variant testimony upon this question.

Rybicki testified that after consulting with his lawyer he took his daughter Pearl, aged fourteen years, to see the defendant Frank Daniel; that they called him out into the street and that Daniel then admitted that he owed Mrs. Rybicki \$9500. Two weeks later Rybicki again went with his daughter to see Daniel and again called him out in the street and talked with him. Rybicki's testimony, in substance, is that he told Daniel that he had found two notes, one for \$5,000 and one for \$4,500, which "makes \$9500 that you owe her," and that Daniel said "he owe her nine thousand and half thousand dollars;" that subsequently Daniel said he was going to pay the notes as soon as he got the money. Pearl Rybicki gave substantially the same testimony as to these conversations.

Daniel's version of these conversations is that when Rybicki with his daughter called him out of his office Rybicki said, "I am guardian in the case before the Probate court," and asked defendant, "Do you owe Mrs. Rybicki any money, on how many notes do you owe?" and that Daniel replied, "I suppose you will find out;" that Rybicki again asked Daniel as to whether he could tell how much he owed Mrs. Rybicki but the witness said, "You have a lawyer by this time and you will find out;" that Rybicki then endeavored to get the witness to put down on paper what amount he owed Mrs. Rybicki but the witness refused to do this, repeating that Rybicki's lawyer would find out if they had any papers; that he told Rybicki that when it came to a settlement he was going to have his note that was paid. Counsel for defendants argue that Daniel mistrusted

the credibility of the witness, no more is corroborated and intended to get and take up the first note and be introduced agent entered upon them. Whether or not the second note given aiming to have taken these two notes signed by defendant and a business but after her death he was contacted defendant and

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"Daniel's version of these conversations is that when
 first with his daughter called him out of his office hours and
 "in the case before the District Court," and when she
 "said, 'Do you own any Egyptian money, or have any more to
 "sell?" and that Daniel replied, "I suppose you will find out;"
 "and that Daniel called on to whether he could tell her what
 "time and you will find out;" that Daniel then answered to
 "the witness to put down on paper what would be said to
 "him and the witness refused to do this, saying that Daniel
 "would find out if they had any money; that he told Daniel
 "that it was a settlement he was going to have his wife
 "and Daniel's daughter and that Daniel's daughter

Rybicki and that this was natural as Daniel had known Mrs. Rybicki, having had considerable business dealings with her, and was not inspired with confidence by Rybicki's sudden appearance as representing his deceased wife after having been divorced from her for eleven years.

Daniel testified to a meeting in Mrs. Rybicki's home in the latter part of January, 1939, at which there were present himself, Mrs. Rybicki, her brother Mr. Kopterski and a Mr. Wroblewski. The witness, being an interested party, was not permitted to tell what occurred at this meeting. Kopterski and Wroblewski testified to this.

Joseph Kopterski testified that he was a brother of Mrs. Rybicki and lived with her in her home for about thirteen years, and that he was present at this meeting; that Daniel said to Mrs. Rybicki that he had brought a new \$5,000 note and "I want you to give me \$4500 note back;" that she showed the new note to Wroblewski and then told Daniel to sit down and wait while she would find the ^{other} note; in a few minutes she came back, saying, "I am very sorry, Mr. Daniel. I could not find the old note, but I will give it to you as soon as I find it;" that Daniel said, "All right, Mrs. Rybicki, I trust you, when you find it you will give it to me." This witness testified that Daniel was a frequent visitor at Mrs. Rybicki's home, came there three or four times a month and had frequent business transactions with her; that Daniel gave the new note as a kind of renewal of the old one and that when he said he would not be able to get around with all the money, Mrs. Rybicki agreed to take the new note. The witness was cross-examined at considerable length as to this instance, but nothing essentially contradictory was developed.

Wroblewski testified that he knew Mrs. Rybicki and had lived at her home and was acquainted with some of her business; that

he was present at the meeting in the latter part of January. His testimony is definite and detailed to the effect that Daniel gave the new note for \$5,000 to take up the prior note of \$4500; that Mrs. Rybicki showed the witness the note and that after searching for the old note she told Daniel that she had not been able to find it but as soon as she did she would give it to Daniel. This witness also was subjected to considerable cross-examination but his story remained definite in its essential particulars.

The testimony of these two disinterested witnesses, one of them a brother of the deceased, would seem to establish defendants' claim that the second note of \$5,000 was given in payment of the first note of \$4500 and accepted by Mrs. Rybicki as payment.

Plaintiff, however, introduced in evidence a cashier's check of the Depositors State Bank for \$4,000, drawn to the order of Wladyslaw S. Rybicki, bearing date January 21, 1929, which is the same date as the second note of \$5,000. This was endorsed by Mrs. Rybicki and turned over to Frank Daniel, who admits its receipt and the money thereby represented. Plaintiff's counsel argues earnestly that this check represents the consideration for the \$5,000 note and thus negatives defendants' claim that it was given in payment of the first note. The fact that the note is for one amount - \$5,000 - and the check for a less amount - \$4,000 - would seem to indicate that they are not connected in the same transaction. Defendant claims this check represents other and different transactions between Mrs. Rybicki and himself which had no connection with the notes in question. Daniel testified that he got this \$4,000 cashier's check in payment of moneys loaned Mrs. Rybicki in cash at different times between September 1 and Christmas of 1928. He testified that he first gave her \$600 about September 1, 1928; that she was involved in a criminal case and needed money and she wanted him to sign her bond but that his property was

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involved and he got the money from the Medel Dairy Company with which he was connected and with which he had a checking account; that later in September he gave her an additional \$300 in cash, in October \$670 cash and in the latter part of October an additional sum amounting to \$2300 in cash; that thereafter he asked her for the money back and that this cashier's check of \$4,000 was given to him by her in repayment of these advances. Daniel was subjected to a very searching cross-examination but stuck to his story that this check was in payment of sums loaned to plaintiff in cash and was not received by him in consideration of any note that he gave her.

The trial court had a better opportunity to judge of the credibility of the respective witnesses than have we. Although Daniel's explanation of the \$4,000 cashier's check received by him may be questionable, yet it is not necessarily untrue. The testimony of the deceased's brother, Reptarski, and of her friend, Treblecki, that the second note was given in payment of the first, is definite and positive. In this state of the record we are constrained to abide by the judgment of the trial court who saw the witnesses and heard them testify. We cannot say that the conclusion of the court is manifestly against the weight of the evidence. It follows, therefore, that the judgment must be affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

received and no part of the money from the Royal Navy being
and he was connected with which he had a special interest;
and later in 1904 he gave her an additional £1000 in cash,
which £1000 came out of the £1000 gift of money as additional
an account of £1000 in cash; that thereafter he never saw her
he never saw her and that this account of £1000 was given to
it is not a statement of facts. He never saw her and he never
very seriously considered the possibility of her being dead and
there was no reason of any kind to believe that she was
or received by him in connection of any other case he gave her.
The trial court had a proper opportunity to take up
the possibility of the positive evidence that she was
which a statement of the fact that she was killed by him
of the evidence, but it is not necessarily correct. The trial
any of the defendant's friends, neighbors, and at New York,
witnesses, that the court had not taken in account of the fact
a failure and mistake. In this case the court was not
mentioned to him by the defendant at the time when he was
at witness and heard that fact. The court was not
action of the court is manifestly against the weight of the
evidence. It follows, therefore, that the judgment should be
reversed.

REVEREND.

REVEREND AND O'CONNOR, JJ., concur.

34157

STANLEY CHIZZELS,
Appellee,

vs.

TUTHILL BUILDING MATERIAL COMPANY,
a Corporation, and CITY OF CHICAGO,
a Municipal Corporation,
Defendants.

On Appeal of CITY OF CHICAGO, a
Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

257 I.A. 644

MR. PRESIDING JUSTICE MOSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover compensation for personal injuries received in a collision between two auto-trucks, had a verdict and judgment against both defendants for \$5,000. Defendant City of Chicago appeals.

Plaintiff was driving a Pontiac truck north on Halsted street in Chicago, while another truck owned by the Tuthill company was going south. They collided at or near the intersection of 122nd street. Plaintiff's theory is that there was a hole on Halsted street about 75 feet north of the north cross-walk at 122nd street and that the Tuthill truck going south was negligently driven into the said hole so as to cause it to swerve and strike the north-bound truck driven by plaintiff. Defendant's theory is that the accident happened at the north cross-walk of 122nd street, where the street was in good condition, and that even if the accident happened, as claimed by plaintiff, about 75 feet north of 122nd street where there was a hole, the evidence shows that the hole had nothing to do with the accident; that plaintiff was driving immediately behind another truck which was going north and pulled out to the west in an attempt to pass it, going into the path of the south-bound Tuthill truck.

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We hold that the judgment must be reversed and the cause remanded for another trial for the reason that plaintiff has failed to prove by the necessary quantum of evidence that the presence of the hole on Halsted street was the proximate cause of the accident. We shall note only a few salient points.

The accident happened in the afternoon of May 9, 1933. Most of the witnesses place the time at about three o'clock. There is a divergence of opinion as to whether the accident happened, as testified to by plaintiff's witnesses, about 75 feet north of 122nd street or, as defendant's witnesses say, near the north crosswalk of 122nd street. A witness who lived on Halsted street testified as to the condition of the street about 75 feet north of 122nd at the time of the accident. The paved portion of asphalt was about 20 feet wide; a hole ran from the west edge of this pavement about four or five feet eastward; it was about three feet wide and approximately four or five inches in depth. The hole had been there some time; in the rest of the pavement there were small cracks - no big holes - not enough to affect driving; there was ample room at this place for two automobiles to pass going in opposite directions if the drivers were careful.

Plaintiff testified that there was no truck immediately in front of him going north; that he saw the Tuthill truck was coming south on the west half of the roadway while he was on the east half of the roadway. The witness was asked whether the Tuthill truck changed its direction at any time before the collision, to which he gave a rambling, incoherent answer. Again he was pressed as to whether the Tuthill truck got over east of the center line of the pavement, but repeated questions as to this failed to elicit a definite answer. Finally the plaintiff was questioned by the court as follows: "The Court: Did you see the truck get over the center line of the street? A. Well - it is pretty hard to guess at all.

We hold that the judgment must be reversed and the

case remanded for another trial for the reasons just stated.

It is so ordered by the necessary majority of the court.

Witness my hand and seal of the office of the clerk of the court at the city of New York, this 10th day of May, 1911.

Attest: I, the clerk of the court, do hereby certify that the foregoing is a true and correct copy of the original.

The evidence presented in the absence of any other

of the witnesses given the fact of the accident. There

is a divergence of opinion as to whether the accident occurred, or

not, as by the plaintiff's witnesses, about 75 feet north of

the street, as the defendant's witnesses say, near the north corner

of the lot. A witness who lived on the lot stated that

as the accident occurred, the street was 75 feet wide at that

time of the accident. The parties testified that the accident

occurred at the edge of the lot, about 75 feet north of

the street. It was about 100 feet wide and about

100 feet long. The lot was about 100 feet long and

100 feet wide. The accident occurred about 75 feet

from the street. There were small trees on the

lot. The accident occurred about 75 feet from the

street.

The evidence presented in the absence of any other

of the witnesses given the fact of the accident. There

is a divergence of opinion as to whether the accident occurred, or

not, as by the plaintiff's witnesses, about 75 feet north of

the street, as the defendant's witnesses say, near the north corner

of the lot. A witness who lived on the lot stated that

as the accident occurred, the street was 75 feet wide at that

time of the accident. The parties testified that the accident

occurred at the edge of the lot, about 75 feet north of

the street. It was about 100 feet wide and about

100 feet long. The lot was about 100 feet long and

The Court: I am not asking you to guess anything now. You either saw it or did not see it. A. I did not. The Court: What? A. I did not."

Joseph Beratis, testifying for plaintiff, said he was at 121st street and Halsted when the accident happened; that the Futhill truck was going in a zigzag manner. But on cross-examination he testified that this truck was going "straight south on the west side of the road," although later he said that when the accident happened the Futhill truck was in the middle of the road; that its left-hand wheels were over the middle of the road a couple of feet. He also said that after the collision the Futhill truck "was not there" but ran past plaintiff's truck 50 feet; that it kept right on going for 50 feet down the pavement and was still on the pavement after the accident; that neither truck was off the pavement after the accident. This is contrary to all the other evidence which is that after the accident the trucks were locked together on the west side of the street, the plaintiff's truck facing north-west, the front of it being about 10 or 15 feet west of the street pavement, and the Futhill truck was right up against it at the side.

Walter Spetyla testified for plaintiff that he was at 122nd and Halsted streets, walking north from 123rd street; that the Futhill truck tried to pass the hole in the street and turned east and hit the front part of plaintiff's truck. He said he thinks the left wheel of the Futhill truck was somewhat to the east of the middle of the street, although he modified this by saying he did not know if this was the fact or not.

Henry Jurgenson, testifying for the City of Chicago, said he was about a block away, coming north on Halsted street, and saw the collision; that the trucks were on the northeast corner of 122nd and Halsted streets, right on the corner; that there were no holes in the street at this place.

Mr. Court: I am not asking you to make anything new. The story

now is or has been is. A. I did not. The body: What?

A. I did not."

Joseph Daniels, Esq., for plaintiff, said he was

at that street and called when the accident happened; that the

Trinity street was "in a slight hurry. Not an open-communication

he testified that this street was being "repaired" on the way

into of the road," although later he said that the accident

happened the Trinity street was in the middle of the road; that the

half-block ahead was over the middle of the road a couple of feet

It was said that after the collision the Trinity street "was not

there," but was "repaired" in such a way that it was almost

as good as new from the sidewalk and was still on the road

just after the accident; that Trinity street was all the way

after the accident. This is contrary to all the other evidence

which is that after the accident the street was closed, and

on the west side of the street, the plaintiff's truck was

west, the truck of the plaintiff is in the west of the street

movement, and the Trinity street was right up against it at the time

Witness Joseph Daniels for plaintiff said he was at

Trinity street and called when the accident happened; that the

Trinity street was in the middle of the road; that the

Trinity street was "in a slight hurry. Not an open-communication

he testified that this street was being "repaired" on the way

into of the road," although later he said that the accident

happened the Trinity street was in the middle of the road; that the

half-block ahead was over the middle of the road a couple of feet

It was said that after the collision the Trinity street "was not

there," but was "repaired" in such a way that it was almost

as good as new from the sidewalk and was still on the road

Theodore Olsen testified for the defendant that he was the driver of the Futhill truck; that there was another large truck going north immediately ahead of plaintiff's truck; that as he neared 122nd street plaintiff pulled out to the west in the path of the Futhill truck; that plaintiff was going about 30 miles an hour; that when the witness saw the collision was imminent he swerved towards the west in order to avoid the accident; that when the plaintiff's truck stopped it was on the north sidewalk of 122nd street, on the west side of the pavement, off on Halsted street; that the right wheel of his truck was against the center of the Futhill truck underneath the bumper part. This witness testified positively that as he came south he did not swerve out of his way on account of any holes; that the hole north of 122nd street had nothing to do with the accident; that when he first saw plaintiff's truck it was on the south side of 122nd street and that plaintiff at about the north cross-walk pulled out to the west in order to pass the truck ahead of him. This witness also testified that he passed this point eight times a day and never noticed any holes at the place where the collision occurred.

We have noted only enough of the evidence to indicate the basis for our conclusion that it has not been proven that the hole on Halsted street caused the accident. Plaintiff, although evidently not literate, under pressure finally said definitely that at the time of the collision no part of the Futhill truck was east of the center line of the street. The driver of the Futhill truck says the same thing. The testimony of plaintiff's supporting witnesses differs in many important respects from what seems to be the admitted facts. We are not content to let the judgment stand. It will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

Mathnett and O'Conner, JJ., concur.

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34254

GUSSIE KATZ,
Plaintiff in Error,

vs.

NATIONAL TEA COMPANY,
a Corporation,
Defendant in Error.

WRIT TO SUPERIOR COURT OF
COOK COUNTY.

257 I.A. 644

MR. PRESIDING JUSTICE MCGURLEY
DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff seeks the reversal of
an order dismissing her suit for want of prosecution.

She brought suit claiming damages for personal injuries
caused, as alleged, by some nails in a loaf of bread purchased from
defendant which injured her teeth and mouth. The suit was brought
to the June term 1929 of the Superior court. The sheriff returned
the summons, "Served this writ on the within named National Tea
Company, a corporation, by delivering a copy thereof to B. Hoffman,
Secretary and Agent of said Corporation this 23rd day of May, 1929.
The President of said Corporation not found in my county." June
10th defendant was defaulted for failure to appear, and June 25th
a jury assessed plaintiff's damages at \$1500. On the same date de-
fendant entered a limited appearance and moved to set aside the
verdict and quash the service of summons. This motion was entered
and continued to July 1st. Plaintiff moved that judgment be entered
on the verdict, which motion was denied.

Defendant supported its motion to set aside the verdict
and quash the summons by affidavits - one by Louis L. Mintz to the
effect that he was the general counsel of the defendant and that
defendant was not served with summons; that at the time of the
alleged service of the summons the first vice-president and the
second vice-president and the secretary-treasurer were all present

STATE OF NEW YORK
IN SENATE
January 11, 1911.

1. *Staphylococcus aureus* (100%)

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On February 1, 1968, the following information was received from the Bureau of the Census:

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THE UNIVERSITY OF CHICAGO PRESS

2. The first of these is the fact that the system is not a simple one, but a complex one, involving many different factors and many different people. The second is the fact that the system is not a static one, but a dynamic one, which is constantly changing and evolving. The third is the fact that the system is not a closed one, but an open one, which is constantly interacting with the outside world. The fourth is the fact that the system is not a linear one, but a non-linear one, which is characterized by feedback loops and other non-linear relationships. The fifth is the fact that the system is not a deterministic one, but a probabilistic one, which is characterized by uncertainty and risk. The sixth is the fact that the system is not a single one, but a multiple one, which is characterized by many different goals and objectives. The seventh is the fact that the system is not a simple one, but a complex one, involving many different factors and many different people. The eighth is the fact that the system is not a static one, but a dynamic one, which is constantly changing and evolving. The ninth is the fact that the system is not a closed one, but an open one, which is constantly interacting with the outside world. The tenth is the fact that the system is not a linear one, but a non-linear one, which is characterized by feedback loops and other non-linear relationships. The eleventh is the fact that the system is not a deterministic one, but a probabilistic one, which is characterized by uncertainty and risk. The twelfth is the fact that the system is not a single one, but a multiple one, which is characterized by many different goals and objectives.

and limited power of the old and new laws.

7. The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the City of New York, for the year 1900:

1991, and the 1992 and 1993 surveys were conducted in 1994.

1000

[illegible]

... ..

and other things at home have been arranged for the 1st of June - a happy day!

Source: see notes 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2

Journal of Management Education 30(1) 1-12

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and the following year, 1960, the same pattern was repeated.

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at the offices of defendant in the City of Chicago and that all or either of them could have been served with such summons; that Helen Hoffman upon whom the summons was served was not the secretary or any officer of said corporation, but was employed by it as a stenographer; that defendant at no time had any notice or knowledge of the pendency of the suit until June 28th when some person notified the affiant that a default had been entered in said cause and the same submitted to a jury and thereupon this motion was made the following day to vacate and set aside the default and for leave to defend. The affidavit further alleged a good and meritorious defense to plaintiff's claim and denies that plaintiff purchased the article claimed by her in her declaration, and denies that she was injured as there alleged, and denies that plaintiff suffered any damages by reason of any act of the defendant.

Helen Hoffman also made affidavit that she had been an employee of the defendant for about three months and never held any official position in said company; that she had no recollection of being served with any summons or court paper in this or any other cause; that her understanding of legal matters was so limited that if she had been served with summons she would not have understood the nature or meaning of same. She further states that all the officers, except the president, were present in the offices of the company in Chicago on the date of the alleged service of summons, and that she at no time notified ^{one} any/of said company of the fact of having received any legal paper or notice of the pendency of the suit.

The court thereupon allowed defendant's motion and ordered the verdict and the default to be set aside, and ordered that the limited appearance stand as a general appearance of the defendant, which was given leave to plead and a plea of general issue was filed instantly. Plaintiff then advised the court that she intended to stand on the record and would refuse to proceed.

The witness of defendant in the City of Chicago and that all of
that of them could have been served with summons; that when
from whom the summons was served was not the necessary ex-
-ty officer of said corporation, but was employed by it as a clerk-
-master; that defendant at no time had any notice or knowledge of
-the contents of the said writ until three days after service was made
-on defendant that a writ had been served in said cases and that
-was submitted to a jury and defendant's motion was made the
-following day to vacate and set aside the verdict and the issue is
-there. The plaintiff's counsel alleged a good and sufficient de-
-fense to plaintiff's claim and held that plaintiff's movement was
-fully justified by her in her testimony, and holds that she was
-justified as there alleged, and holds that plaintiff's motion was
-denied by reason of any act of the defendant.

And the witness also said that the writ was not served on
-any of the defendants for about three months and never said any
-thing about service in said company; that she had no recollection of
-the papers with any summons or writs being in said or any other
-company; that not understanding of legal matters and no having been
-the had been served with summons she would not have understood
-nature or meaning of same. She further states that all the
-writs, except the plaintiff's, were present in the office of the
-company in Chicago on the date of the alleged service of summons,
-and that she at no time received any of said company at the time or
-when received any legal papers or notice of the contents of the

11.
The court thereupon allowed defendant's motion and
-ordered the verdict and the writs to be set aside, and ordered
-that the plaintiff's motion stand as a general judgment of the
-court, with costs given leave to give and a writ of habeas
-corpus was then granted. Plaintiff then moved the court that
-a writ should be issued on the record and would be granted.

The court called the case for trial, and plaintiff refusing to proceed the court dismissed the suit.

It has been the long and well established practice in this state that courts should be liberal about setting aside defaults at the term at which they were entered when it appears that justice will be promoted thereby. In City of Moline v. C. B. & A. R. R. Co., 262 Ill. 53, it was held that, when it appears from the affidavit filed in support of the motion to set aside a default that the party has a defense to the merits, "it has been usual to set aside the default if a reasonable excuse is shown for not having made the defense. (Mason v. McNamara, 57 Ill. 274.)" A motion to set aside a default is addressed to the sound discretion of the court to which it has been made, and unless there has been a palpable abuse of such discretion courts of review will not interfere. It is only where it is evident that the action of the trial court has been unjust and oppressive and has resulted in a substantial injury to the plaintiff that such action will be reversed. Rich v. Hathway, 18 Ill. 548; Cooper v. Handelsman, 247 Ill. App. 464; Isay v. The Union of Roumanian B. & C. Societies, Number 33948, opinion filed in this court February 24, 1930. In the recent case of Hogan v. Bravick, 335 Ill. 181, the court said:

"While it is highly commendable to dispose of causes with celerity and dispatch it is more important that justice be done, and where for any good reason a defendant has been unable to present his defense, a court of law will set aside a judgment obtained ex parte and order a new trial. McMurray v. Penbody Coal Co., 281 Ill. 218; City of Moline v. Chicago, Burlington and Quincy Railroad Co., 262 id. 52; Mason v. McNamara, 57 id. 274."

These citations are applicable to the instant case. In the interests of justice the court properly set aside the default and permitted defendant to appear and defend. Plaintiff should have proceeded with the trial, but refusing to do so there was nothing for the court to do except dismiss the suit at her costs.

the court called the case the "suit," and the court decided the suit.

It has been the law, and will continue to be, in

the state that courts should be divided about equal in

power at the time of trial they were entered upon in

action will be granted summary. In State of Illinois v. E. J. R.

1884, 104 Ill. 411. It was held that, when a summary is

granted, it is subject to the right of the party to

and the party has a chance to be heard. It has been held

that the defendant is a necessary party in cases for

and the defendant. Illinois v. E. J. R. 104 Ill. 411. A

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the suit. It is only

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at the suit, and the defendant is a party to the suit.

It is the duty of the court to be reversed. Illinois v. E. J. R.

1884, 104 Ill. 411. It was held that, when a summary is

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1884, 104 Ill. 411. It was held that, when a summary is

granted, it is subject to the right of the party to

and the party has a chance to be heard. It has been held

Plaintiff's brief presents thirty-four points as grounds for reversal, but none of them call upon us to depart from the usual rule of liberality in setting aside defaults upon motions made at the same term the judgment is entered.

We respectfully suggest that counsel for plaintiff hereafter follow carefully the requirements of our Rule 19 in the preparation of his briefs.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

The following is a list of the names of the persons who have been identified as having been in contact with the subject of this investigation at the time of the investigation of the subject of this investigation.

1995

1. *tenen* = (N) „nehmen“ (dem. 3. Person)

34282

NEW YORK BOND & MORTGAGE COMPANY,
Appellee,

vs.

E. W. McWILLIAMS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 114.644

MR. PRESIDING JUSTICE McDERMOTT
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment of \$660 entered upon the finding of the court upon the trial of a writ wherein plaintiff claimed brokerage commissions earned by it in securing a mortgage loan on real estate in Chicago. Plaintiff does not appear in this court to defend the judgment.

Plaintiff's claim is based on a writing dated August 6, 1927, addressed to the New York Bond & Mortgage Company, in which defendant authorized it

"To negotiate a first mortgage loan of \$11,000 for 5 years from date, interest 6% per annum, payable semi-annually, to be secured on the real estate at 5313-13 Prairie Avenue, present encumbrances: First mortgage \$7,000, Int. 6%, Due, April, 1928.

"If you secure the loan for me my spouse and myself will sign trust deed and notes on forms satisfactory to you or to the maker of said loan, and assignment of all rents to secure payment of the loan. I hereby agree to pay you 5% on said amount applied by us for commission for negotiating said loan," and in addition costs of drawing papers, etc. "If you succeed in procuring or negotiating said loan or having the same accepted, and if the undersigned shall fail to accept the same as herein provided the undersigned agrees to pay you said commission as compensation for services in negotiating or procuring said loan."

Defendant signed this and also plaintiff as follows: "Accepted:
New York Bond & Mortgage Co. By George Cohen 8/6/27."

Cohen, the secretary of plaintiff, testified that he secured a party, M. Schlensky & Sons, who was willing to make a first mortgage loan of \$11,000, but that defendant did not consummate the loan. Harry Schlensky, a member of M. Schlensky & Sons, testified that he had inspected the property and told Cohen, "I will take the loan."

Defendant testified as to the circumstances which led up to the signing of the paper and as to the causes which prevented the consummation of the proposed loan. Plaintiff, testifying in rebuttal, made no substantial denial. The trial court, however, was apparently of the opinion that defendant's testimony was an attempt to change the legal effect of the writing by parol testimony and held that plaintiff had made out a case by proving the execution of the paper and that he procured a party ready to make the loan.

We are not inclined to hold that this paper alone constituted a contract binding the parties. It was merely an offer by defendant. Plaintiff did not undertake to do anything. The plaintiff, however, could place defendant under an obligation by performing the conditions of the offer. Until the plaintiff did so the offer remained in legal effect unaccepted. In the absence of performance the writing of the word "Accepted" was of no avail. In Campbell Inv. Co. v. Taylor, 246 Ill. App. 435, the court considering a similar instrument held that the paper itself was not a binding contract but merely an offer, and that "if one offers to be bound if another will do something, a contract may arise when the thing is done, but will not upon a mere promise to do it," and that "the offer was capable of being accepted only by doing something, that is, consummating" the undertaking.

We are also of the opinion that this was not a case for the application of the general rule excluding parol evidence which contradicts or varies a valid written instrument. The writing should be read in the light of the surrounding circumstances in order to understand more perfectly the meaning and intent of the parties. In Linn v. Clark, 295 Ill. 82, it was held that it was permissible to introduce "evidence of the circumstances of the execution of the contract and of facts in connection with it which

[illegible]

may tend to explain its meaning by showing the situation of the parties and all their relations to one another and the subject matter of the contract." In Bell v. McDonald, 308 Ill. 389, where a promissory note was involved, it was held that evidence was admissible that the instrument was not intended to take effect until the occurrence of some future contingency, and that such evidence does not contradict the terms of the writing.

The writing before us shows at least one obscurity in the undertaking proposed. It authorized the plaintiff to negotiate a first mortgage loan of \$11,000 but recites the existence of a first mortgage encumbrance of \$7,000 already on the property, which did not mature until nearly eight months after the date of the writing. This demonstrates the necessity of parol evidence to explain this inconsistency, for obviously there could not be two first mortgages on the property.

It develops from the testimony of the defendant that he did not own the property in question but that the title was in Anna Goldberg, daughter of Jacob Goldberg, who apparently represented her. It was under a contract of sale to defendant, which provided for payments in instalments. Defendant desired to secure a first mortgage for an amount which would enable him to pay off the existing first mortgage of \$7,000 and pay Goldberg a substantial amount on the contract of purchase and also put defendant in funds with which to pay some other obligations. This situation was imparted to Cohen who undertook to procure the consent of the holder of the \$7,000 first mortgage to accept pre-payment and also to obtain the consent of Goldberg to the increase of the first mortgage to \$11,000. Cohen said he "would bring Goldberg across," and in a letter written subsequently refers to the time he spent with Goldberg in attempting to obtain his consent.

Defendant is a minister, evidently unversed in the ways

... to which the money by moving the attention of the
... and all their relations to the witness and the subject
... of the contract." In Ex. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, where
... it was held that evidence was ad-
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... the writing before as being of legal and substantial in
... it was held that the instrument is legal
... but voids the evidence of a
... of \$1,000 already on the property, which
... after the date of the
... This document is necessary of legal evidence to ex-
... but evidence there could not be two times
... on the property.
... of the following facts
... in question but that the title was in
... the property, the property was
... it was under a contract of sale in default, which
... in default of the property, the property was
... the property would enable him to pay off
... and pay off the property a substantial
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... This situation was in-
... the interest of the holder
... to secure the property and also to
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... the interest of the holder in the property of the first mortgage
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... in the property to secure the property.

and language of mortgage loans, and also out of the city frequently, so it was natural that he should leave the matter entirely with Cohen. It is obvious, therefore, that plaintiff through Cohen undertook to procure: (1) a party ready and able to make a first mortgage loan of \$11,000; (2) the consent of the holder of the \$7,000 first mortgage to accept pre-payment; and (3) the consent of Goldberg to increasing the first mortgage from \$7,000 to \$11,000. It is a reasonable inference that Goldberg's consent involved the signing of the new mortgage note and trust deed by Anna Goldberg, who held the title. All these were essential and necessary to complete performance by plaintiff.

The record shows that while plaintiff succeeded in procuring a party ready to make a first mortgage loan of \$11,000, it failed as to the two other essentials. The evidence is silent as to the attitude of the holder of the first mortgage. Goldberg testified that he refused to consent to increasing the amount of the first mortgage over \$7,000. He testified that when Cohen called upon him he told him, "There is no use to bother again. You know I got a contract and the contract said he cannot make a bigger loan; he has to keep the same loan what he has got now." And again in Cohen's office Goldberg told him, "I want the mortgage to stay like it is."

Plaintiff never brought about the conditions which would make possible a first mortgage loan of \$11,000. Defendant's offer to pay a commission was not transmuted into a binding obligation, for the conditions of the obligation were not carried out. Under such circumstances plaintiff was not entitled to recover the compensation mentioned in the agreement and judgment should have been entered for defendant.

For the reasons indicated the judgment must be reversed and judgment of nill capiat will be entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT HERE.

Matchett, J., concurs.

O'Connor, J.: I agree with the conclusion but not in all that is said in the opinion.

and language of mortgage loan, and also out of the city property.
as it was stated that he would leave the matter entirely with
them. It is obvious, however, that plaintiff through Green
understand to recover: (1) a party loan; and also to make a time
mortgage loan of \$11,000; (2) the amount of the holder of the
\$1,000 time mortgage to accept assignment; and (3) the amount
of delivery to increasing the time mortgage from \$1,000 to \$11,000.
It is a reasonable inference that plaintiff's account involved the
signing of the new mortgage note and deed and by Green plaintiff,
the holder of the. All these were essential and necessary to
complete performance by plaintiff.

The court then said that plaintiff was entitled to
recover a party loan to make a time mortgage loan of \$11,000,
it being as to the two other statements. The evidence in dispute
as to the validity of the holder of the time mortgage, plaintiff
testified that he refused to consent to increasing the amount of
the time mortgage over \$1,000. He testified that when Green
called upon him to call him, "There is no use in further action
for now I got a contract and the contract said to accept make a
party loan; he has to take the time loan with me and now."
and again in Green's office plaintiff said him, "I want the mortgage
to stay time it is."

Plaintiff next stated that the contract with Green
made possible a time mortgage loan of \$11,000. Defendant's offer
to pay a commission was not transmitted into a binding obligation.
The conditions of the obligation were not carried out. Green
and defendant testified and yet plaintiff to recover the com-
mission mentioned in the agreement and plaintiff should have been
entitled to defendant.
The evidence indicated the judgment was to be reversed.
and judgment of all parties will be entered in this court.
REVEREND AND TRUSTEE OF ALL SAINTS CHURCH.
Witness, J. J. Green.
I agree with the conclusion but not in all that is
said in the opinion.

33754

WILL HOWELL & ASSOCIATES,
a Corporation,
Appellant,

vs.

JAMES A. CARTER,
Appellee.

103A
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2571A. 844⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff corporation sued defendant for money alleged to be due upon an oral contract said to have been made December 30, 1927, by which it was claimed defendant employed plaintiff to furnish art work and advertising to enable defendant to carry on a membership campaign for the Mount Vernon Yacht and Country Club with which defendant represented he had a contract of employment. Plaintiff claimed an agreement by which he was to be paid a retainer of \$3,000 to cover preliminary costs.

The affidavit of merits denied the agreement but alleged that there was a written agreement in and by which plaintiff was to receive \$3,000 on the first \$50,000 collected for membership fees.

There was a trial by the court and a finding for defendant with judgment thereon.

Other litigation between these parties has been before this court in Gen. No. 33755, in which an opinion, not yet reported, was filed January 6, 1930.

The alleged written contract was set up verbatim in the affidavit of merits and was proved and identified upon the hearing as Exhibit 1, but apparently through inadvertence this and other exhibits likewise identified were not formally introduced in evidence. Plaintiff says that the finding of the trial court shows clearly that it was based upon the court's interpretation of the written contract and argues that for that reason the judgment

1944

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HEREIN IS UNCLASSIFIED

DATE OF REVIEW: 10/1/88

BY: [illegible]

100-104444

RE: [illegible]

RE: [illegible]

It is the policy of the FBI to release information to the public...

...in accordance with the provisions of the Freedom of Information Act...

...and to make such information available to the public in the most effective manner...

...possible, consistent with the law and the interests of the Nation...

...and to make such information available to the public in the most effective manner...

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1944

There was a trial by the court and a finding for the...

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should be reversed. The original exhibits appear in the record. They were proved and identified, and it is apparent that in the trial of the case the parties and the court proceeded upon the theory that these exhibits were in evidence. There was therefore a decision of the cause upon the merits, and this court, by a consideration of these exhibits, is able to review the cause upon the merits. Under these circumstances we will not reverse merely to compel a compliance with a technical formality.

The controlling question in the case is whether the finding of the trial court is clearly and manifestly against the evidence. Plaintiff urges the proposition that where the trial is by the court a motion of defendant for a finding in favor of defendant at the close of plaintiff's case is in the nature of a demurrer to the evidence and is the same as a motion by defendant for a directed verdict at the close of plaintiff's case; citing Helm v. Commercial Men's Ass'n, 275 Ill. 570; McQuinn v. Reynolds, 286 Ill. 138; Munter v. Freun, 315 Ill. 293, and similar cases, where the question before the court was whether a motion at the close of plaintiff's evidence for a directed verdict in defendant's favor should be allowed. Such a motion raises a question of law. Donelson v. East St. Louis Ry. Co., 235 Ill. 625; Wath v. Chicago City Ry. Co., 243 Ill. 114.

These cases are not controlling here. The finding of the court was based upon all the evidence, and the evidence was conflicting. In such a case, upon appeal to this court, the ultimate question for determination is not whether a motion for a particular finding should have been granted but whether the finding and the judgment are clearly against the evidence. In deciding that question the finding of the court is entitled to the same consideration as would be given to the verdict of a jury. Baldier v. Richardson, 107 Ill. App. 536.

[illegible]

In this state of the record we cannot say that the finding of the court is manifestly wrong, and the judgment of the trial court is therefore affirmed.

AFFIRMED.

McSurely, F. J., and O'Connor, J., concur.

In this paper of the present we cannot say that the
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 tests have been determined.

RESULTS

Results of the tests in which the results of the tests have been determined.

33845

R. C. CLARK VEEKER COMPANY,
Appellant,

vs.

IRVING G. LAXOVE,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 L.A. 645

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff company sued defendant upon his guaranty of five promissory notes made by the Sonata Manufacturing Company, a corporation.

The statement of claim was verified and alleged that there was due, after all just credits were allowed, \$1749.61. The affidavit of merits denied any liability; denied that any amount was due, and set up with great detail other alleged defenses which will be hereafter mentioned. There was a trial by the court and a finding for defendant, upon which the court entered judgment which plaintiff argues should be reversed.

Four of the notes sued on were made October 24, 1923, to the order of plaintiff. Three of these were for \$200 each and the fourth for \$149.61. These four notes were due ten, eleven, twelve and thirteen months, respectively, after date. The fifth note, dated July 2, 1924, was for the sum of \$1,000, payable to the order of plaintiff, and by its terms became due November 2, 1924. These notes by their terms did not draw interest prior to maturity. Each and all of them were executed by the Sonata Manufacturing Company, by defendant, Irving G. Laxove, its president.

Each of the notes dated October 24, 1923, bore the following endorsement upon the back of it in red typewriting: "In the event that the payee is unable to collect said notes from the Sonata Manufacturing Company, a corporation, then and in that event I hereby guarantee the payment of the same." This endorse-

U. S. MARSHAL SERVICE
WASHINGTON
DIVISION OF INVESTIGATION
RECEIVED
JAN 11 1934

RECEIVED
JAN 11 1934

2242

RE: EDWARD GEORGE BREMER; THE BREMER CASE; THE BREMER

The following summary of the evidence in this case is based on the testimony of the witnesses who were called by the Government and the defense.

The statement of the witness who was called by the Government is as follows: That on the 11th day of January, 1934, at New York City, New York, the witness was present at the residence of the late Edward George Bremer, who was then residing at 1111 Madison Avenue, New York City, New York. The witness was then present at the residence of the late Edward George Bremer, who was then residing at 1111 Madison Avenue, New York City, New York. The witness was then present at the residence of the late Edward George Bremer, who was then residing at 1111 Madison Avenue, New York City, New York.

That on the 11th day of January, 1934, at New York City, New York, the witness was present at the residence of the late Edward George Bremer, who was then residing at 1111 Madison Avenue, New York City, New York. The witness was then present at the residence of the late Edward George Bremer, who was then residing at 1111 Madison Avenue, New York City, New York. The witness was then present at the residence of the late Edward George Bremer, who was then residing at 1111 Madison Avenue, New York City, New York.

That on the 11th day of January, 1934, at New York City, New York, the witness was present at the residence of the late Edward George Bremer, who was then residing at 1111 Madison Avenue, New York City, New York. The witness was then present at the residence of the late Edward George Bremer, who was then residing at 1111 Madison Avenue, New York City, New York. The witness was then present at the residence of the late Edward George Bremer, who was then residing at 1111 Madison Avenue, New York City, New York.

ment was signed "Irving O. Lazove." The note for \$1000 bore the same endorsement, with the exception that the singular "note" was used instead of "notes," as in the other endorsements.

Default was made in the payment of each of the notes at maturity, and plaintiff brought suit on December 16, 1924, in the Municipal court of Chicago, making defendants thereto the corporation maker and the guarantor Lazove. Defendants appeared and defended, Lazove upon the ground, among others, that the action was premature as to him. On July 16, 1925, the maker, Sonata Manufacturing Company, was adjudicated a bankrupt, and when the case was called for trial Lazove contended that his liability could not be determined until the bankrupt's estate was settled. Plaintiff took a non-suit as to him.

The bankruptcy matter was pending until December 6, 1926, and plaintiff received upon its claims dividends from the bankruptcy estate amounting to \$235.11. This suit was begun December 31, 1926.

The Sonata Manufacturing Company was a corporation organized under the laws of Illinois with a capital stock of \$7500. The incorporators were Dave Feigenberg, Joseph M. Liner and William Piotriuski. Defendant Lazove is a practicing lawyer and represented the Sonata Company as its counsel. The company was engaged in the manufacture of phonograph cabinets and in the course of its business purchased material from plaintiff company. In October, 1923, plaintiff claimed an indebtedness of \$2000 or \$3000, and there were other creditors. Defendant in his affidavit of merits states in regard to the company:

"That prior to the month of October, 1923, an audit was taken of its books and the defendant discovered that due to mismanagement it was practically insolvent and unable to meet its obligations and that in order to protect the indebtedness of the company to him, Lazove, he purchased all of the stock and assumed the management and paid all of its liabilities."

The stock was increased to \$15,000. Lazove held 147

[illegible]

Reference was made to the payment of \$100.00 to the United States Treasury on December 14, 1944, and a check of \$100.00 was cashed on December 14, 1944.

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The following matter was handled until December 15, 1964, and definitely resolved upon the second division from the following matter concerning to 1964.11. This was done

The Kansas Manufacturing Company was a corporation organized under the laws of Illinois with a capital stock of \$100,000. The incorporators were David H. Thompson, Jacob A. Jones and William Thompson. William Thompson is a prominent lawyer and represented the Kansas Company on the ground. The company was organized in the month of September 1892 and in the month of January 1893 received capital from private sources of \$25,000. The company claimed an incorporation at that time, and there were other witnesses. Thompson in his affidavit stated in regard to the company:

[illegible]

of the 180 shares of stock transferred to him, and he testifies that later he transferred 148 shares of this stock to his brother-in-law, Harry Wolfe. Defendant acted as president and treasurer of the corporation, and Wolfe seems to have been in charge of the details of the business.

On October 24, 1933, the date of four of the notes, plaintiff, by its president Clark, and the Sonata Manufacturing Company by its president Saxove, entered into an agreement in writing, which recited that the Sonata Manufacturing Company had been purchasing pencils from plaintiff; that there had been a change of stockholders and active participants in the Sonata Company; that a dispute had arisen between the parties, and "Whereas, it is desired that all disputes and differences of every kind be adjusted and compromised;" that in consideration of the execution of 12 notes, numbered 1 to 12 of that date, amounting to \$2349.61, by the Sonata Company, plaintiff would release and discharge the Sonata Company of any and all claims up to and including October 24, 1933, "it being the intention of the parties to adjust any and all claims, counter-claims and differences up to the date of the execution of this Agreement."

The four notes of that date here used on are a part of the notes executed and delivered pursuant to the terms of that agreement.

One of the many defenses set up in the affidavit of merits, on which defendant now insists, concerns his claim that the guaranties upon these notes were given by defendant without consideration.

As to the four notes dated October 24, 1933, defendant testified that after they were delivered and on the Wednesday following their execution the notes were brought to his office by Clark, president of plaintiff company, who said he could not

THE JURY, after a deliberation of about one hour, returned a verdict of guilty of the crime of murder in the first degree, and recommended that the defendant be sentenced to death.

negotiate them at the bank unless they were guaranteed by defendant, and that pursuant to that request then made, defendant wrote the guaranties on the back of these four notes without any prior agreement so to do.

On the contrary, Clark testified that the guaranties by Lazove were written upon these four notes at the time they were executed in Lazove's office. In response to questions by defendant he said:

"I saw you sign on the face and the back. I helped you blot your name on them. They were signed in your private office. There was a discussion as to whether the notes were to be paid by you or the Sonata company. You guaranteed. *** You said the Sonata Company was broke, that we were mighty lucky you had come in to take hold of it or we wouldn't get a cent. You said you would personally guarantee the payment of the note if we would take the paper."

There is a presumption of law that the guaranties on the back of these notes were executed at the same time as the notes (Kankakee Coal Co. v. Crane Mfg. Co., 138 Ill. 207), and under the negotiable instrument law (see Smith-Burd's Ill. Rev. Stat. 1929, chap. 98, article 11, sec. 24) every negotiable instrument is presumed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon, to have become a party thereto for value.

Even if it is conceded that the notes were accepted upon the condition that the guaranties should be executed at a later time, the later execution under such circumstances would relate back to the original promise and would be supported by the same consideration. Hall v. Stackhouse, 38 Pa. State, 302; Stanley v. Mills & Adams, 36 Miss. 434; Williams v. Perkins, 21 Ark. 13; Ford v. McJain, 164 Mo. App. 174, 148 S. W. 190; Straud v. Thomas, 139 Cal. 274, 72 Pac. 1008.

On behalf of plaintiff evidence was given to the effect that, prior to the execution of these four notes, the Sonata Manufacturing Company was in arrears; that it had given its notes

...and the

[illegible]

402-403, 408-409, 410-411

On the morning of 11/11/1944, the following information was received from the Bureau of the Census:

金 融 工 业 研 究 所

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Page 101 of 101

100-17708-100 (4) 100-17708-100 100-17708-100

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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● 2013 年 12 月 1 日起实施的《机动车驾驶证申领和使用规定》(公安部令第 123 号)规定, 驾驶人驾驶机动车上道路行驶前, 应当对机动车的安全技术性能进行认真检查; 不得驾驶安全设施不全或者机件不符合技术标准等具有安全隐患的机动车。

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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...the fact that the ...

the 1st September, 1914, the witness being then 18 years of age.

1. The first part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them. The list includes names such as "John A. Smith", "John B. Smith", "John C. Smith", "John D. Smith", "John E. Smith", "John F. Smith", "John G. Smith", "John H. Smith", "John I. Smith", "John J. Smith", "John K. Smith", "John L. Smith", "John M. Smith", "John N. Smith", "John O. Smith", "John P. Smith", "John Q. Smith", "John R. Smith", "John S. Smith", "John T. Smith", "John U. Smith", "John V. Smith", "John W. Smith", "John X. Smith", "John Y. Smith", and "John Z. Smith".

U.S. DEPARTMENT OF JUSTICE

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1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 26

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for indebtedness to plaintiff, and that these notes were not honored when due; that defendant, upon taking control of the company, requested further time on amounts then due and further credits for additional material which the Sonata Company desired to purchase, and that these requests were granted only upon the condition that defendant should guarantee the notes, which he agreed to do. The books of plaintiff kept in the usual course of business; the testimony of Miss Wilms, who kept the books; the testimony of the president of the company, Clark, and of Davis, another employee of plaintiff - all of these give probable, credible and consistent evidence to this effect.

On the contrary, defendant, his stenographer, Miss Paegensen, and a friend of defendant named Byron Goldberg, testified that the guaranties were put on the notes in the week following the Saturday upon which it was agreed the notes were executed and delivered to Clark. These witnesses testified that they were present when Clark brought the notes back to defendant's office and said the bank would not discount the notes because the Sonata Company was not rated.

In determining the weight to be given the evidence of some of the witnesses produced by defendant, we think their testimony on another issue of fact as to the fifth note may well be considered.

This fifth note was for the sum of \$1,000 to the order of plaintiff, dated July 2, 1924, and, as already stated, a similar guaranty of defendant appears on the back of it. In the affidavit of merits defendant states by way of defence to this item that at the time of settlement on October 24th, plaintiff fraudulently represented that the Sonata Company had purchased \$1,000 worth of panels and requested an accommodation note therefor for the purpose of discounting it; that as a matter of fact plaintiff

[illegible]

was already obligated to deliver such panels in order to complete sets of panels theretofore delivered; that under such fraudulent representations defendant, on behalf of the Senata Manufacturing Company, executed a note for \$1000 dated January 30, 1934, due four months after date; that plaintiff, pursuant to its intention to defraud, made no demand on the Senata Company for payment of that note at maturity; that about the end of July, Clark, in behalf of plaintiff, again appeared in defendant's office and offered an extension of four months if defendant would guarantee the same; that thereupon defendant executed this note and wrote his endorsement thereon; that he subsequently learned that the Senata Company was not indebted for that sum, but that the prior note was fraudulently obtained; that he immediately informed plaintiff of the fraud and requested an opportunity to discuss the matter, but that Clara of plaintiff company did not keep his promises in that respect and that six weeks subsequent to the maturity of the note suit on the note was begun.

Defendant testifies that this note was executed June 30, 1934, in exchange for the former note and at the request of Clark, and that he at the same time gave Clark a check for \$400 in payment of two other notes for \$200 each; that one of these notes was at the bank, but that he trusted Clark to deliver it to him thereafter; that Clark did not immediately return the \$200 note as agreed; that later he got Clark on the 'phone, having learned from Wolfe of the fraud in securing the \$1000 note for panels which plaintiff was already obligated to deliver in order to complete sets for which settlement had been made; that Wolfe got Clark on the 'phone and that defendant listened; that Clark said he would come down and adjust the matter; that Wolfe said, "You have a hell of a lot of nerve imposing on my brother-in-law, who was helping you out;" that Wolfe told Clark that if he was not there by 3:30 there would

[illegible]

be a fist fight and that he wanted the note back but that Clark never showed up; that none of the notes were paid thereafter, nor did plaintiff make any demand of payment or attempt to collect them;

Miss Faegelsen in this respect also gave evidence tending to corroborate her employer. Wolfe also corroborated this lurid testimony.

Clark in rebuttal testified that he did not secure the \$1,000 note on July 3, 1924, and that in January of that year he settled with defendant for panels sold subsequent to the settlement made on October 24, 1923; that plaintiff took back such panels from the Sonata Company as it did not wish to use; that at that settlement in January plaintiff received a \$1,000 note and a check for about \$71 in settlement. Clark's version of this transaction is corroborated by written documents, as well as by the evidence of those who know the facts.

An invoice dated October 27, 1923, appears in the record as plaintiff's exhibit 23 and shows the purchase by the Sonata Company on October 27, 1923, of material amounting to the total sum of \$1000.24. Another invoice shows the purchase on the same date of material amounting to \$367.68. In fact, on January 12, 1924, a letter was written to plaintiff signed by the Sonata Manufacturing Company by Harry Wolfe, which appears in the record as plaintiff's exhibit 19, in which the Sonata Company states:

" * * we must insist that you send us a corrected statement which will cover all merchandise shipped to us after October 24, 1923, the date of our settlement, and no other items.

Just as soon as you do that, we will endeavor to check the same up and make payment on whatever little might be due you."

Cross-examination developed that while this letter was written on stationery of the Sonata Manufacturing Company, it was

in a light and that he wanted the same but that they

were under the impression that the same was not intended, and

the plaintiff was not aware of the fact of the same.

With respect to the plaintiff's claim, the same was

based on the fact that the plaintiff was not aware of the

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in fact dictated by Wolfe and typewritten by Miss Paegenson, secretary of defendant. Moreover, it appears from the testimony of an attorney, Mr. Sears, that plaintiff prior to July, 1934, upon the maturity of this note for \$1,000, placed the same with him for collection; that he went to defendant's office and discussed with him the payment of the same; that defendant made a proposition to him to pay \$400 cash to take up two of the installment notes and that upon surrender of the \$1,000 note, a new note for \$1,000 would be given; that Sears accepted the proposition, received a check for \$400 and the new note for \$1,000 guaranteed by defendant, and that on July 1, 1934, he, Sears, sent the same to plaintiff. His letter to plaintiff is in evidence and states:

"I also enclose a new note of the Sonata Mfg. Co. guaranteed by Mr. Zazove, for \$1,000, to your order, together with three notes, two for \$200.00 each and one for \$149.61, of the Sonata Mfg. Co. I believe that this is a good settlement, for while I was unable to induce Mr. Zazove to pay interest on the four months' renewal note and you thereby lose five months' interest, nevertheless I did get his guarantee, for what it is worth, thereon, and this you did not have before. I believe these notes will be paid as they fall due."

A consideration of the evidence upon this point makes it necessary to hold, not only that any finding in favor of defendant upon the issue of fraud in obtaining this \$1,000 note would be against the manifest weight of the evidence, but that the evident fabrication of this defense discredits the testimony of Wolfe, defendant, and his stenographer on the issue as to the other notes. We therefore hold that the defense of fraud, insofar as the \$1,000 note of July 2nd is concerned, is not sustained by the evidence, and that the evidence fails to establish the defense of want of consideration as to any and all of these notes.

The only other defense concerning which there may be said to be any evidence is that plaintiff failed to exercise due diligence in the collection of these notes. The guaranty was not absolute in its nature but contingent upon the fact that plaintiff

...that ...

[illegible]

1. The first question is whether the evidence is sufficient to establish the fact of the defendant's guilt. The evidence is sufficient to establish the fact of the defendant's guilt.

The only other person named in the report is
said to be my witness in the incident. The witness
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plaintiff should be unable to collect from the corporation. As defendant was in entire control of the corporation and in control of its assets, it would seem that he is not in a favorable position to urge this defense, since, assuming the solvency of the Donata Manufacturing Company, as he now contends, he could at any time have prevented all damage and injury to himself by paying these obligations at maturity from the assets of the corporation. The notes were discounted at the bank, and it appears, contrary to defendant's contention, that he had notice of the maturity of the same and that payment had not been made. At any rate, under these circumstances he was chargeable with such knowledge. Memerow v. Nat'l Lead Co., 206 Ill. 636; Fort Dearborn Nat'l Bank v. Miller, 178 Ill. App. 450.

It affirmatively appears that defendant was not injured through any neglect of plaintiff to diligently prosecute its claim. Heberling Mfg. & En. Co. v. Smith, 201 Ill. App. 126. Suit was brought against the corporation maker and defendant jointly. Defendant filed an affidavit of merits as to himself and claimed that the suit was premature, and also, while in entire control of the company, an affidavit of merits, for which it must be assumed he was responsible, denying liability, was filed. His own affidavit of merits shows that the corporation was practically insolvent during all this time, and it was in fact adjudicated a bankrupt and defendant credited with the amount received through the bankruptcy court. Defendant is obligated to pay the balance remaining due upon these notes, and as the cause was tried without a jury the judgment for defendant in this case will be reversed with a finding of facts and judgment here for \$2239.23 in plaintiff's favor.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE.

McSurely, P. J., and O'Connor, J., concur.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive one.

— 22 —

[illegible]

THE UNIVERSITY OF CHICAGO PRESS

... ..

We find as facts that defendant, Irving G. Lazev, is guarantor of the collection of the notes upon which plaintiff sues; that the same were not paid at maturity; that plaintiff used due diligence to collect the same from the maker, the Senata Manufacturing Company, and duly prosecuted its claim in the bankruptcy court, where the maker was adjudicated to be a bankrupt; that any suit against the maker of the notes would have been unavailing, and that defendant under his guaranties, as written on the back of said notes, is liable to plaintiff for the amount unpaid thereunder; that there is now due and owing from defendant, Irving G. Lazev, to plaintiff, E. G. Clark Veneer Company, the principal sum of \$1749.61 with interest at 6 per cent, amounting to \$489.67, making a total sum of \$2239.28, for which judgment should be entered in favor of said plaintiff and against said defendant in this court.

to find an estate and defendant, Irving H. Jones,

in possession of the estate of the said deceased and defendant

and that the same were not paid as aforesaid, then plaintiff

shall be entitled to receive the same from the estate, the

estate of the said deceased, and only to the extent of the claim in

the foregoing, and that the same be adjusted to be a

plaintiff; that the said estate of the said deceased

have been received, and that defendant shall be

in possession of the estate of the said deceased, in

the said estate, and that the said estate be

paid to the said estate, Irving H. Jones, in

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paid.

33863

THE INMAN COMPANY,
a Corporation,
Appellee,
vs.
IRVING G. ZASOVE,
Appellant.

1057
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 I.A. 645²⁻

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, The Inman Company, sued defendant upon his written guaranty of payment of a note of \$3843.76 made by the Sonata Manufacturing Company, a corporation, to plaintiff's order September 17, 1924, with interest at six per cent, due sixty days from date.

The affidavit of merits denied anything was due; alleged payment, release by failure to protest, want of consideration, release by failure of plaintiff to sue the maker on demand of defendant, and discharge by reason of an extension of time for payment of the note after maturity without the guarantor's consent.

There was a trial by jury and a verdict in plaintiff's favor for \$869.21, on which the court, overruling motions for a new trial, entered judgment.

Defendant argues error in the admission and rejection of evidence, in remarks of counsel and of the trial court during the trial, and urges that his motion to withdraw a juror should have been granted, and that there were errors in the giving and refusing of instructions.

An examination of the record discloses many procedural errors. The situation is well summarized in the following colloquy between defendant and the trial Judge:

"Mr. Zasove: Judge, in view of all this hilarity and talk of counsel, I am going to renew my motion; this case has been made a farce; I can't possibly get a fair trial---

The Court: I agree, it has been a farce to some extent; but you are responsible for most of it; motion denied.



THE
OFFICE OF THE
SHERIFF
OF THE
COUNTY OF
LOS ANGELES
CALIFORNIA

2571 A. 815

RE: JAMES EARL RAY, ALIAS, ET AL.

RE: RAY, JAMES EARL, ALIAS, ET AL.

RE: RAY, JAMES EARL, ALIAS, ET AL.

RE: RAY, JAMES EARL, ALIAS, ET AL.

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RE: RAY, JAMES EARL, ALIAS, ET AL.

Mr. Mazove: I except to the comments of the Court here."

We have carefully gone over the record, and we think the attorney for plaintiff as well as defendant, who acted as his own attorney, deserve criticism for the manner in which the trial was conducted.

The points involved in the case, however, are, in our opinion, few and simple. On the back of the note sued on appears the guaranty of defendant in the following language:

"I hereby guarantee the payment of the within note by the Sonata Mfg. Co., Inc., Irving G. Mazove."

The rights of the parties on this instrument must be determined under an act in regard to negotiable instruments, payable in money, approved June 5, 1907, (see Smith-Hurd's Ill. Rev. Stat. 1929, chap. 98, pp. 1961 and 1966). Sections 118, 119 and 191 are particularly applicable. Section 118 sets up the manner in which a negotiable instrument itself may be discharged. Section 119 states the law as to how a person secondarily liable upon negotiable paper may be discharged from his liability, while section 191 defines who are primarily liable and who are secondarily liable upon negotiable instruments.

In Wulfschlag v. Rothschild, 342 Ill. App. 642, construing these sections of the statute, we held that a guarantor, although the form of his guaranty was absolute, was secondarily liable upon the note guaranteed by him, and that he could be discharged from such liability only in one of the ways set forth in section 119.

An agreement in favor of the principal debtor binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, is one of the ways in which a person secondarily liable on an instrument is discharged. However, in this case, while there is some evidence of a promise by plaintiff to extend the time of payment of the note, there is

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

any opinion, two had simply, on the basis of the work done on the

22. The following information was obtained from the records of the Bureau of the Census:

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[illegible]

1. The first of these is the fact that the

THE UNIVERSITY OF CHICAGO

Although the form of his handwriting was distinctive, the handwriting in this letter was not the same as the handwriting in the letter from the same source dated 10/10/44.

• **PIF** **and** **Food**

It is a fact that the Government is not in a position to provide for the needs of the people in the event of a disaster. The Government is not in a position to provide for the needs of the people in the event of a disaster. The Government is not in a position to provide for the needs of the people in the event of a disaster.

no evidence of any consideration to support such promise, and even if it is conceded that such agreement was made, it was therefore not binding upon the holder and defendant was not discharged.

The controlling question in the case, as we view the record, is one that goes to the merits, namely, whether the note had been, as defendant contends, paid in full. There is no evidence in the record from which the jury could have reasonably found for defendant as to any other defense presented.

The affidavit of claim admits payments on the note of \$1343.76 on December 12, 1924; \$529.72 on October 7, 1924; \$351.07 on December 21, 1926; a credit for goods returned of \$212 on an uncertain date and a payment of \$100 on an uncertain date.

It was proved upon the trial that on March 16, 1925, a further payment of \$1,000 was made, leaving due a total principal of \$327.21 with interest thereon.

Defendant offered proof intended to show a further payment by check on February 24, 1925, of \$750. The proof offered was to the effect that a check was mailed to plaintiff at that time for that amount, but the proof for plaintiff was to the effect that this check was never in fact received. The check was not produced, although it should have been available if actually paid. The burden of proof to establish the payment was on defendant, and the evidence is not sufficient to show even prima facie the payment of this item.

According to the computations of interest set forth in defendant's brief, which are not disputed by plaintiff, and assuming the other facts to be as we have heretofore stated, there remains due on this note the sum of \$351.66. We think the court, if the request had been made, would have been justified in instructing the jury to return a verdict in plaintiff's favor for that amount. The judgment for the larger sum is clearly and manifestly against

no evidence of any consideration in support of such promise, and even
it is conceded that such agreement was made, it was therefore
not binding upon the holder and defendant was not liable.
The outstanding question in the case, as to when the
promise, is one that goes to the merits, namely, whether the note
was paid, as defendant contends; paid in full. There is no evidence
in the record from which the jury could have reasonably found the
defendant as to any such payment.
The affidavit of claim against defendant on the note of
\$100.00 on December 12, 1934; \$100.00 on December 17, 1934; \$100.00
on December 21, 1934; a credit for goods returned of \$100.00 on an
uncertain date and a payment of \$100.00 on uncertain date.
It was proved upon the trial that on March 14, 1935,
a certain payment of \$1,000 was made, leaving due a total principal
of \$100.00 with interest thereon.
Defendant offered proof intended to show a payment
by check on February 22, 1935, of \$100.00. The proof offered
was to the effect that a check was mailed to plaintiff at that time
for that amount, but the proof for plaintiff was to the effect that
this check was never in fact received. The case was then closed,
although it should have been available if actually paid, the burden
of proof to establish the payment was on defendant, and the offer-
ence is not sufficient to show upon which the payment of
this item.
According to the computation of interest set forth
in defendant's brief, which are not disputed by plaintiff, and
assuming the other facts to be as we have heretofore stated, there
remains due on this note the sum of \$2821.88. We think the court, if
the facts had been made, would have been justified in instructing
the jury to return a verdict in plaintiff's favor for that amount.
The judgment for the plaintiff was in a clearly and manifestly erroneous

the weight of the evidence. If plaintiff will file a re-mittitur in the sum of \$517.85 within ten days, the judgment will be affirmed; otherwise it will be reversed and the cause remanded for another trial.

AFFIRMED UPON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

34031

TONY L. LANGSTON,
Plaintiff in Error,
vs.

ROBERT S. ABBOTT PUBLISHING
CO., a Corporation,
Defendant in Error.

106 7
ERROR TO CIRCUIT COURT
OF COOK COUNTY.

257 I.A. 645³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On January 28, 1927, Langston filed a bill in equity based on an alleged contract for advertising services said to have been entered into between the parties on January 2, 1922. The contract was set up verbatim, and complainant prayed an accounting thereunder.

Defendant filed a plea to the bill in which it averred that at the time of making the contract, and prior thereto, one Phil A. Jones was employed by defendant as manager in publishing and distributing The Chicago Defender; that Jones conspired and confederated with complainant to defraud defendant and pursuant thereto, in violation of the by-laws of the corporation, signed the contract in behalf of defendant without regard to and in violation of the terms of an exclusive contract dated May 1, 1920, between defendant and W. B. Ziff Company; that Jones did this without consulting the counsel of the corporation; that he agreed with complainant to collect from advertisers in The Chicago Defender the moneys owing by said advertisers to defendant, not as agent of defendant but on his own account; that in pursuance of this conspiracy Langston paid Jones a percentage of the moneys collected, which he retained and never accounted for to defendant; that said contract was kept secret from the president and board of directors of defendant corporation from the date of its execution, January 2, 1922, until June 27, 1925, and that upon the discovery of his fraudulent conduct Langston resigned.

1034-1035

NOTES AND CORRESPONDENCE

422

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 08-10-2001 BY 60322 UCBAW

STANDARD FORM NO. 64

324.1A.723

FROM THE OFFICE OF THE ATTORNEY GENERAL

On January 20, 1967, [redacted] advised that he had been contacted by an alleged contact for advertising services who he had seen several days before the parties on January 8, 1967. The contact was not by [redacted], and consequently stayed an advertisement.

[illegible]

A replication was filed and the cause was referred to a master for the purpose of determining whether complainant was entitled to an accounting.

The master reported that the allegations of the plea were not sustained and recommended that a complete accounting should be taken. Defendant filed objections to this report, which were overruled and by order stood as exceptions upon the hearing before the chancellor.

The chancellor sustained the exceptions, overruled the report and entered a decree that the bill be dismissed for want of equity. To reverse that decree the complainant has sued out this writ of error.

While there is some conflict in the evidence, as we will hereafter notice, there is little doubt as to the actual facts. Defendant is a corporation engaged in publishing a weekly newspaper known as "The Chicago Defender," which has a considerable circulation. The corporation was organized and is owned and controlled by its president, Robert M. Abbott. In 1913 complainant Langston became associated with the business as a writer of theatrical news and a solicitor of local advertising. He operated under the name Langston Advertising Service.

In 1919 Phil A. Jones became general manager of the paper. He was also the secretary of the corporation. In the performance of his duties Jones occupied the same office as Abbott, the president. Langston opened negotiations through Jones which on January 2, 1922, resulted in the execution of the written contract upon which this suit is based. By its terms defendant corporation employed Langston as its special agent and correspondent for the purpose of securing advertising matter and writing special articles. Langston on his part agreed to solicit and accept for the corporation amusement, theatrical and theatrical entertainment

A telephone was lifted and the wires were removed in a matter of five minutes at the following telephone exchange was

The names mentioned in the list were not included in the original list of names. The names listed in the list were not included in the original list of names. The names listed in the list were not included in the original list of names.

The material contained in the enclosed is being furnished to you for your information and is not to be distributed outside your agency. It is requested that you advise the Bureau of any change in the status of this material.

While there is some overlap in the evidence, no one
all relevant action, there is little doubt as to the nature of the
reference to a corporation engaged in holding a really developed
known as "The Chicago Corporation," which was a corporation created
also. The corporation was organized and is owned and controlled
by the President, Robert A. La Follette. In 1918, the corporation
business associated with the business as a matter of organized work
and a division of local organization. It operated under the name

is this Bill A. Jones seems General manager of the
agency. He was also the secretary of the association. In the pay-
ment of his father Jones worked the most efficient as agent.
The association, however, spent considerable money in the
of January 1, 1915, provided in the constitution of the association
that after this Bill is dead. If the Jones association
thereby engaged in the general agency and advertising
for the purpose of securing advertising matter and selling special
articles. Dependent on the fact agreed to include and accept the
the association's business, including the general advertising

advertising and was given permission to solicit "all other kinds of advertising matter for the party of the first part." The contract also provided that Langston should provide each week a minimum of two full pages of theatrical news and reading matter and write special articles and advertising matter upon request for defendant's publication.

The corporation agreed on its part to pay Langston as full compensation 50 per cent of all publication charges for such advertising matter as might be printed in The Chicago Defender, and 50 per cent of all charges for other general and commercial advertising matter which he was also given permission to solicit, Langston being responsible for the payment of all advertising matter over which he had exclusive control.

The contract by its terms was to begin on January 2, 1922, and to continue for a period of five years. This contract was executed in the name of the corporation by Jones as manager.

Neither Jones nor Langston at any time informed Abbott that the contract was about to be made, nor was either Abbott or the directors of the corporation informed of it in any way until June 27, 1925.

Article 21 of the by-laws of the corporation provided:

"The President shall when present preside at all meetings of the stockholders and of the Board of Directors; he shall have general and active management of the business of the Company unless some or all of such powers are delegated to the General Manager appointed by the Board of Directors."

Abbott testifies that at the time of Jones' employment he, Abbott, told him that "I expected him to take care of all of the general business of the company, but at no time should he handle contracts, because I knew he knew nothing of contracts of any description, and because when it came to that I had a lawyer, my attorney, to take care of all the contracts, he must see them before I signed them, and I would go to his office to sign them." Abbott

...and was given permission to collect "all other things" ...
...the matter for the purpose of the first year. ...
...also provided that ...
...two full pages of ...
...medical articles and ...

The corporation agreed on the part to pay ...
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...which was ...
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further testifies that he told Jones that he must not enter into contracts without consulting Judge George, who was counsel for the corporation.

Judge George testifies that in a conversation with Abbott in the presence of Jones, "Abbott told Jones that he was going away and that Jones should not enter into any contract except upon consulting me and meeting with my approval."

It is undisputed that the contract was entered into without consulting Judge George. Jones, however, denied the conversation as testified to by Abbott and George. A clear preponderance of the evidence is to the effect that the contract was entered into on the part of Jones without authority and contrary to positive directions of the president of defendant corporation.

Harper, an employee of defendant, testifies that shortly after the contract was made Langston told him that he "had put over a master stroke, that he had signed up a contract there that would make some money for him and Phil and that Mr. Biff would go a little bit slow now." Complainant denies that he ever said this, but the determination of this fact is not controlling, although it would appear that Harper is a disinterested witness.

Complainant testifies that he rendered monthly statements under the contract, but a certified accountant who audited the books of defendant corporation after Langston ceased to act as its agent, was not able to find any such statements.

Prior to the execution of this contract with Langston defendant corporation through Jones (but with the approval of Abbott) entered into a contract with W. B. Biff Company. The master (erroneously, we think) excluded the contract when offered in evidence. It appears, however, that it was construed by the parties to give to W. B. Biff Company the exclusive right to solicit foreign and national advertising for defendant.

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Ziff acting under this contract had secured advertising from certain phonograph record companies at a card rate of forty cents a line. Complainant under his contract was able to and did offer advertising to these same companies at twenty-eight cents a line. As defendant points out, the effect of this was to create competition within the organization itself and cause the loss to defendant of the higher rate. Ziff learned about this competition and remonstrated with Jones, who told him that Langston had a contract with Abbott and that the only thing for him to do was to let the contract go through and deduct his commissions just as he had been doing, and Ziff did so.

Jones admits that he told Langston to go after this business, and Langston told him that he would do so, and "if I can get it I will see that you are taken care of." Langston went to Wisconsin, New York and Philadelphia and came back with the contracts he went after.

It appears from the evidence that on July 17, November 8 and December 10, 1934, Langston gave checks payable to the order of Jones for the sums of \$258.07, \$141.20 and \$168.95 respectively, and that these checks were cashed by Jones.

Langston says that he does not remember saying that he would take care of Jones but explains that he said his profits were larger than he expected and that he was "going to give him a little something off my end of the commissions." While he denies an arrangement with Jones and says Jones was surprised when he gave him the first check, he admits that the second, third, fourth and fifth and continuing checks represented 20% of his 50% compensation.

Whether the contract as originally made was entered into with fraudulent intent or not, it is apparent from the evidence we have recited that it was entered into without authority insofar as Jones was concerned, and against positive instructions

and between the two last columns with column 218.

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1. The first of these is the fact that the

1. The name of "Lump Sum" and "First Mortgage" are given

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This movement is caused by a number of factors, including the search for better living conditions, the desire for education, and the need for employment. The process of urbanization has led to the growth of large cities and the decline of small towns and villages. This has had a significant impact on the economy and society as a whole. The majority of the population now lives in urban areas, which are characterized by high population density, a high level of economic activity, and a high level of social organization. This has led to the development of a new type of society, which is based on the city. The city is now the center of economic and social life in the United States. The majority of the population now lives in urban areas, which are characterized by high population density, a high level of economic activity, and a high level of social organization. This has led to the development of a new type of society, which is based on the city. The city is now the center of economic and social life in the United States.

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Two copies were made by hand.

It shows for the year at \$100.00 and \$100.00 respectively, and

and January 10, 1971, indicating that these figures are the same

[illegible]

10-10-1944

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videofree public art: ideas are all that's required

... ..

of the president of defendant corporation. It also appears that information as to the existence of such contract was carefully concealed by both Langston and Jones from Abbott, to whom by reason of their employment they were under obligation morally and legally to make the fullest disclosure and to deal in the utmost good faith.

Jones and Langston were not ignorant of the details of the business of defendant corporation. They knew of the exclusive contract with Eiff Company and, assuming the slightest intelligence, they must have understood that the inevitable result of their contract would be to injure the business of the corporation by which they were employed. Langston will not be heard to say that he did not intend the natural and probable consequences of his acts, and the undisputed fact that the existence of this contract was concealed from those who had a right to know it, coupled with a continuous payment by Langston to Jones of a portion of the profits, would justify the conclusion of the chancellor that these two conspired together to bring about the results which followed.

It is unnecessary to cite or review authorities. In ordinary fair dealing between men common honesty forbids that courts should use their power to enforce alleged rights obtained by such conduct. Panama & St. P. Tel. Co. v. India Rubber, etc., Co., 1. N. 10 Ch. App. 515; Mechem on Agency, Sec. 2157; Walker v. Marshall Field & Co., 179 Ill. App. 3, and Pan American Petroleum & Transp. Co. v. United States, 273 U. S. 400, 71 L. Ed. 734, are a few of the many cases which might be cited, holding that the wronged and defrauded party has a right to rescind contracts obtained in this manner. Defendant in this case, however, asks no affirmative relief, but the maxim of equity which requires that he who comes into a court of chancery must come with clean hands,

forbids that complainant be allowed to recover upon a contract which was made in bad faith and which is unconscionable and fraudulent. *Fomeroy on Equity Jurisprudence*, 1913 ed., vol. 1, secs. 400-401; Levin v. Chicago Gas Light & Coke Co., 64 Ill. App. 393; Tobey v. Robinson, 99 Ill. 222.

The decree of the trial court is affirmed.

AFFIRMED.

McMurely, N. J., and O'Connor, J., concur.

Twelve days' work, to be done in the month of August.

It is to be done in the month of August.

Twelve days' work, to be done in the month of August.

It is to be done in the month of August.

Twelve days' work, to be done in the month of August.

It is to be done in the month of August.

Twelve days' work,

to be done in the month of August.

34059

GEORG BOHNERT,
Appellee.

vs.

NATIONAL LIFE ASSOCIATION,
a Corporation,
Appellant.

OFFICE OF THE SUPERIOR COURT
OF COOK COUNTY.

257 I.A. 645⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant Insurance company appeals from a judgment in the sum of \$2,372 entered on the verdict of a jury in favor of plaintiff, Georg Bohnert, in an action upon a life insurance policy upon the life of his wife, Kati Bohnert, in which plaintiff was named as beneficiary.

The defense of defendant was set up in a plea of the general issue and in amended special pleas which aver that the insured made false representations with reference to her health and history. To these pleas plaintiff filed replications, and the issue thus raised was submitted to the jury. At the close of all the evidence defendant made a motion that the jury be instructed to return a verdict in its favor, which was denied, and the errors assigned and argued are based upon the refusal of the court to give this and other instructions requested.

The policy of insurance states upon its face:

"This insurance is granted in consideration of the application for this Policy, a copy of which is hereto attached and made a part of this contract, and the payment in advance, while the Insured is in good health," of the premium.

The policy in question was dated February 27, 1925, and delivered to plaintiff March 5, 1925.

Plaintiff upon the trial offered evidence of lay witnesses to the effect that in February and March of that year they saw and talked with the deceased; that she did her own housework, taking care of a house of five or six rooms, and in addition did outside work for other people; that she did cleaning, sewing

and washing for others; that she did two washings a week for outsiders besides her own; that she did not look like a sick woman. The former agent of the defendant insurance company, who delivered the policy, stated that he saw her on March 3, 1908, in her own home and that she then appeared to be in good health.

Defendant contends on the authority of Daniels v. Peter Salgo Co. v. New York Life Ins. Co., 220 Ill. App. 63; Lewandowski v. Western & Southern Life Ins. Co., 241 Ill. App. 55; Hesser v. Globe Mutual Life Ins. Co., 243 Ill. App. 109, that it is a condition precedent to recovery that the insured be in sound health at the time of the delivery of the policy. These decisions so hold and we do not understand that it is contended otherwise. Defendant, however, further contends, on the authority of Ellis v. State Mutual Life Assurance Co., 206 Ill. App. 226, and Steinhardt v. Ill. Bankers Life Assoc., 220 Ill. App. 199, that the evidence of these lay witnesses as to the condition of the health of the insured is entitled to little weight in view of the medical testimony, the records of the hospital at which the insured was treated prior to her death, and the record of the post mortem examination which was held thereafter.

On the other hand, plaintiff has assigned cross-errors and urges that these records were improperly admitted in evidence, for the reason that there was no sufficient preliminary proof of their identity and accuracy.

Defendant called as a witness the assistant superintendent of Angustana Hospital, who had been subpoenaed to produce the records of the hospital concerning the deceased. He testified that he had been such superintendent for five and a half years; that he came in contact with the records of the hospital "indirectly;" that he was conversant with the means and methods of keeping and making them; that upon admittance of a patient a record was made out

...and that was the situation in the early days.

The policy, which was not as good as it could have been, was followed by the Government in the early days.

The Government of the United States has been very successful in its efforts to bring about a more stable situation in the world.

It is hoped that the future will see a more peaceful and prosperous world than the past.

[illegible][illegible]

consisting of the patient's name, address, social state, parents, husband's or wife's name, etc., and that this was done in the case of Kati Lohmert; that the record was taken at the time and in the usual course of conduct of matters in the hospital; that the records were made by the attending physician during the stay of the patient in the hospital and were part of the records of the hospital and kept in its regular files; that a record was made as soon after the patient's admittance to the hospital as possible by the interne on the service of the particular doctor; that it was then attached to the patient's chart and left there together with other records and data; that when the patient left the hospital the record was sent to a record room for filing and was in charge of a record librarian and was kept in sealed filing cases; that the record produced was the original record and was in the same condition as when it was written.

Upon this preliminary proof this record, which purported to give an extended history of the physical condition of the deceased, as well as a record of the findings of a post mortem examination made after her death, was admitted in evidence.

In Wright v. Upson, 303 Ill. 126, the admission of a similar record with somewhat similar proof was held to be erroneous, the court stating:

"The admission of the entire record by the court was erroneous for the further reason that the hospital record was the product of two or more registered nurses, each nurse making entries only at the time and for the time during which she nursed the testatrix. Only one nurse, Miss Erickson, was called to testify as to the correctness of the entries made by her and as to the times they were entered. There is no such proof of the entries made by the other nurses or nurses, and there was no showing in the record that the other registered nurse or nurses were deceased or out of the jurisdiction of the court. If the hospital record is admissible at all it is for the same reason that books of account are admissible and the same character of proof is required, and all persons who make entries therein are required to testify to their correctness before they are admitted in evidence."

In the case of Kimber v. Kimber, 317 Ill. 361, the

[illegible][illegible]

opinion of the court states:

"The trial court admitted in evidence a certain hospital record, and it is insisted by appellants that it was incompetent because some of the notations upon it were made by internes and nurses and not by the physician who testified concerning the record at the time it was offered. Such a record is admissible upon the same basis as books of account, and before it can be admitted in evidence all persons who make entries in it are required to testify to their correctness."

Upon the authority of these cases, we hold that the hospital records were improperly admitted in evidence and that the same must be excluded in weighing the evidence upon the point now under consideration.

Defendant offered in evidence the written proof of death, in which there appeared a statement made by Dr. Oehner, the physician who attended the insured during her last illness; that the cause of death was chronic intestinal obstruction and exhaustion therefrom, and that she had been afflicted with that disease for two years; that a post mortem examination was held and intestinal adhesions found.

Dr. Oehner, however, was called as a witness on behalf of defendant and stated that he first examined the deceased on October 20, 1925, at his office; that her illness had been of some duration but there was "nothing to indicate how long this condition existed, apparently at least several months;" that the deceased told him that she had an operation several years previously for the removal of the gall bladder, and that subsequent to the operation she had an eruption of the gall bladder. He does not remember whether she said that she had habitual constipation or adhesions, or whether she said anything further concerning suffering from an illness or pains prior to the time she came for treatment. He testifies that he performed an abdominal operation but states that he had no opinion as to the condition or health of the patient (other than as already testified to) about February 3, 1926; that a post mortem examination would show something concerning previous

1. The following information was obtained from the records of the Federal Bureau of Investigation, Bureau of Prisons, and the United States Department of Justice, regarding the activities of the Communist Party, U.S.A., in the United States, during the years 1941 through 1945:

and that the information was not to be used for any other purpose than the one for which it was furnished.

20100401 0000 0000

On the 15th of the month of May, 1900, the following was received from the Hon. the Secretary of the Navy:

Washington, D. C., May 15, 1900.

Dear Sir:

I have the honor to acknowledge the receipt of your letter of the 10th inst., and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,
Your obedient servant,
John D. Long,
Secretary of the Navy.

[illegible]

operations; that from observation of existing scars he thought the operations were performed three or four months before October 25, 1925. He further says she told him in the beginning that an operation was had a year or two years before, and that she had an operation at the age of 23 years, one when she was 25 years and another when she was 26 years old, all for drainage of the gall bladder.

Assuming that the provisions of the policy with reference to good health at the time of its delivery is a condition precedent, we think the lay evidence offered by plaintiff was admissible; (C. & S. I. R.R.Co. v. Randolph, 139 Ill. 126; Greinke v. Chicago City Ry. Co., 334 Ill. 564); that this evidence was sufficient to establish a case for plaintiff prima facie, and that there is no competent medical evidence in the record tending to show that deceased was not in good health either at the date upon which she made application for the policy or at the date upon which the policy was delivered to her.

It is further urged, however, that certain pleas which allege false representation by the insured are established by practically uncontradicted evidence. The contention is that in her application for insurance she falsely stated that she had never had any disease of the gall bladder, and it is urged that this representation was false, was known by her to be false, and that it was relied on by defendant company.

The application was made February 3, 1925, the policy was issued as of the date of February 27, 1925, and it was delivered March 3, 1925. The insured died January 2, 1926. The application for insurance was on a printed blank furnished by the defendant company, and it states: "I make the following answers, with those made in Part I hereof, the basis of this application." The questions are numbered from 1 to 16 and some of them have

and another room was used 24 hours a day. All the members of the
organization at the age of 25 years, and when they were 25 years
of age they had a year or two years before, and that was the
first. He further says the fact that in the following year he
organization was not very large or that would be the case in
organization and that they observed of all the points in January 1935

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It is further stated, however, that certain items which have been represented by the insured are not in fact in the possession of the insured, but are in the possession of the insured's agent, and that the insured has not taken any steps to recover the same, and that the insured is not entitled to recover the same.

The application was made February 7, 1968, the date
was issued as of the date of February 7, 1968, and it was dated
February 7, 1968. The number of the document is 100-
[redacted] [redacted] [redacted] [redacted] [redacted]
[redacted] [redacted] [redacted] [redacted] [redacted]
[redacted] [redacted] [redacted] [redacted] [redacted]
[redacted] [redacted] [redacted] [redacted] [redacted]
[redacted] [redacted] [redacted] [redacted] [redacted]

numerous subdivisions, identified as "A, B and C," etc. These questions called for answers yes or no as to whether the applicant was in good health; whether she had ever changed or been advised to change residence because of her health; whether she contemplated making any change in her residence or occupation; whether during the past two years she had been associated with anyone afflicted with consumption or tuberculosis; whether she had ever applied for life insurance without revealing the exact kind or amount of policy applied for; the age and present state of health of her husband; whether her weight had recently increased or diminished; whether she used alcoholic beverages, cocaine or morphine habitually; whether she had taken any treatment of inebriety; to what extent she used intoxicating liquor; whether she was ruptured, and if so whether she wore a truss; whether she had ever had rheumatism, and if so, whether it was inflammatory or accompanied by shortness of breath, palpitation or pain in the chest; together with many other questions covering her marriage relations, the birth of her children, etc. Questions were also asked as to her family history, the ages of her father and mother, her brothers and sisters, her father's father, father's mother, mother's father and mother's mother; whether any of her relatives had suffered from tuberculosis, cancer, apoplexy or insanity; if so, to give particulars.

The particular alleged false representations appear in reply to questions asked under Question 13. This question was: "Have you ever had any of the following?" and underneath in large red letters it is stated: "Make separate answer 'YES' or 'NO' to each question. Then follows:

The following are the names of the persons who have been identified as having been involved in the activities of the Communist Party, U.S.A., during the period from 1940 to 1945:

1. [Name] - [Address]

2. [Name] - [Address]

3. [Name] - [Address]

4. [Name] - [Address]

5. [Name] - [Address]

6. [Name] - [Address]

7. [Name] - [Address]

8. [Name] - [Address]

9. [Name] - [Address]

10. [Name] - [Address]

- | | |
|--|----------------------------------|
| a. Asthma | n. Sores or Ulcers |
| b. Apoplexy | o. Fills or Fistula |
| c. Appendicitis | p. Swollen Glands |
| d. Disease of the heart | q. Varicose Veins |
| e. Disease of the respiratory tract | r. Swelling of the Face or Limbs |
| f. Spitting of blood | s. Gout |
| g. Tuberculosis | t. Cancer or Tumor |
| h. Pleurisy | u. Paralysis |
| i. Disease of the Liver or Gallbladder | v. Epilepsy, Fits or Convulsions |
| j. Disease of the Bladder or Kidneys | w. Discharge from the Ear |
| k. Sugar or Albumin in the Urine | x. Injury or Surgical Operation |
| l. Dizziness or Vertigo | y. Sunstroke |
| m. Habitual Constipation. | z. Habitual Headaches." |

Following which appears the query, "Any other disease?" To each of the items above mentioned the applicant answered "No," and to the query, "Any other disease?" she answered, "None." The 14th question is, "Name below every illness, injury or operation which you have had in the past five years." Underneath this question are appropriate columns for the statement of the name of the illness, the number of attacks, the date, the results, the name and address of the physician. Across the columns appears written the answer, "Nothing."

At the end of the application appears the following printed statement:

"I represent, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, each of the above answers to be full, complete and true, and that I am temperate ***."

Before the signature of the applicant appears a cross in ink, and her signature purports to be witnessed by the examining doctor. On the back of this application appears the medical examiner's report, in which he states that he considers the applicant a first-class risk. The examiner certifies:

"* I have this day made a thorough personal examination in private of said applicant, ** that I do not certify to the health of the applicant nor that he is a fit subject for insurance unless the said statements are all strictly true as presented to me by him as a part of this examination and believed by me to be true."

An examination of the application discloses that the applicant did not, as the application directs, make a separate answer, "Yes" or "No" to each question. Some of the questions were double, and to these the applicant made only one answer. She was asked, "Have you ever had any of the following: ** 1. Disease of the Liver or Gallbladder?" to which she answered, "No." Insofar as the evidence discloses this answer was in part true, for it does not appear from the evidence that she ever had any disease of the liver. If we regard the double question as single, she could not have complied with the directions truthfully by answering, "Yes." She was not asked if she had ever had either disease of the liver or of the gallbladder, and assuming that she had disease of the gallbladder neither "yes" nor "no" would have been a true and complete answer to the question. Moreover, question No. 14, a second inquiry as to "every illness, injury or operation" which the applicant had had, was limited expressly to "the past five years." The applicant had had no disease of the gallbladder, so far as this evidence shows, within that time. On the contrary, the evidence definitely shows that the operations performed on her for that trouble had taken place more than five years before her application. For the plainest of reasons, the law is well settled that where there is any ambiguity with reference to the meaning of a contract of insurance which has been prepared by the insurance company, the construction must be adopted which is most favorable to the insured. Bolton v. Standard Life Ins. Co., 219 Ill. App. 177; Julius v. Metropolitan Life Ins. Co., 220 Ill. App. 423; Bernhardt v. Merchants Reserve Life Ins. Co., 221 Ill. App. 66.

In Van Warner v. Metropolitan Life Insurance Co., 186 Ill. App. 166, the opinion, which is abstracted, holds:

THE COURT: The first question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged. The evidence is sufficient to establish that the defendant is guilty of the crime charged.

"Answer 'No' to a question asked in an application for life insurance: 'Have you ever been an inmate of, or have you ever attended for treatment, an asylum, hospital or sanitarium? If yes, when, how long and for what?' construed as not constituting a false representation, since the question embraced at least three questions, and the answer so far as the evidence showed was correct as to two of them and the fact that the words 'sanitarium' and 'asylum' were connected with 'hospital' might have misled the applicant."

In Cooley's Briefs on Law of Insurance, vol. III, p.

2012, the author states:

"It may happen that a question is not answered at all, or is imperfectly or partially answered. That concealment avoiding the policy cannot be predicated on a failure to answer or on imperfect answers is a principle laid down in Phoenix Mutual Life Insurance Co. v. Madain, 120 U. S. 183, 7 Sup.Ct. 800, 30 L. Ed. 644, the leading case on this point. In this case a certain question consisted of four successive interrogatories. The applicant answered only one of these. The Court held, if the company regarded the other interrogatories as material, they should have repeated them, or have put further questions; that their failure so to do waived their right of requiring further answers, and estopped them to set up the omission to disclose the facts called for as a ground of avoiding the policy. American Life Ins. Co. v. Mahan, 36 Miss. 180, was decided on like ground.

"Where the answers are, however, merely unresponsive so as to leave the fact inquired of wholly undisclosed and the question practically unanswered, the contract will not be avoided; but the insurer must follow up the inquiry, in order to assert a concealment avoiding the policy."

The evidence tends to show that the insured and her husband, plaintiff, are both natives of Hungary. The application is not in the insured's handwriting. It should, if possible, be construed in her favor. Fraud is not presumed, and the burden of establishing it to the satisfaction of a jury was on defendant. Defendant company prepared these double questions. Its form of application directed an answer to each question. The deceased did not comply with that direction; nevertheless defendant accepted the application. On the authorities cited, defendant therefore waived further answers and will not now be heard to complain that the disclosure was not full and complete. Moreover, upon the same subject-matter, the question prepared by defendant company shows that it regarded such facts as are here disclosed by the evidence

as immaterial provided the same occurred more than five years prior to the application. The uncontradicted evidence, insofar as the operations for gall bladder trouble are concerned, is that the same occurred more than seven years prior to such application. In brief, the situation is that, with the evidence of the hospital record excluded, there was abundant evidence to go to the jury upon the proposition that the insured was in good health at the time she applied for insurance and at the time the policy was delivered, and excluding this same evidence, we think the jury was justified in returning a verdict for plaintiff and the court in entering the judgment thereon.

Defendant complains that the court refused to instruct the jury that if the insured had habitual constipation at the time she applied for insurance "and/or" when the policy was issued, the finding should be for defendant; that if at the time of application or of delivery of the policy or payment of premium the insured had impaired health, the finding should be for defendant; that if the insured made unreliable and unwarranted answers in the application and these were depended on by defendant, the finding should be for defendant; that if the insured had diseases of the liver or gall bladder at the time of application "and/or" when the policy was issued, the finding should be for defendant. The refusal to give these and several other instructions is argued as error.

Rule 12 of this court requires an applicant to state in his brief the points relied on with supporting cases. It provides:

"No point not contained in such brief shall be raised afterwards either in oral or printed argument or by reply brief or on petition for rehearing."

Defendant has wholly disregarded this rule. No complaint of these instructions is made in the points and authorities of defendant's brief, and we should, perhaps, refuse to

consider these arguments for that reason. However, we think the instructions were properly refused, some on the ground that they were mere repetitions in given instructions, some because the defense stated in the instruction was not set up in defendant's pleas, and others because a verdict was instructed without stating all the facts which would authorize such verdict.

Pardridge v. Cutler, 168 Ill. 504.

A number of these instructions contain the phrase "and/or." Why the phrase is used in an instruction, or what it means, we are at a loss to understand. It seems well designed to confuse a jury, but, otherwise, useless.

For these reasons the judgment of the trial court is affirmed.

AFFIRMED.

McSweeney, F. J., dissents.

O'Connor, J., concurs.

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34121

CHAS. A. STEVENS & BROS.,
a Corporation,
Appellant,

vs.

CHAS. J. BRONKZ,
Appellee.

1087
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 I.A. 645⁵

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment for defendant entered upon the verdict of a jury as instructed by the court. The suit was for goods, wares and merchandise to the value of \$342.71 alleged to have been sold and delivered at defendant's request.

The statement of claim averred that the goods were "wearing apparel for the use and benefit of the family and was a family expense." The affidavit of merits denied that plaintiff at any time sold and delivered to defendant "wearing apparel for the use and benefit of defendant's family." It also denied the averment of the statement of claim that there was an account stated as to these transactions.

It is urged that the court erred in excluding evidence offered in behalf of plaintiff and in directing a verdict against plaintiff and entering judgment thereon.

It is apparent, although defendant here contends otherwise, that the case was tried upon the theory that defendant was liable under section 15 of chapter 68 (Smith-Hurd's Ill. Rev. Stat. 1929, p. 1608), which provides:

"The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors thereof, and in relation thereto they may be sued jointly or separately."

Plaintiff called defendant as its witness under section 33 of the Municipal Court act, and he testified that he was

101

STATE OF NEW YORK
IN SENATE
JANUARY 1, 1908.

REPORT
OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
MAY 1, 1907.

ALBANY:

PRINTED BY THE STATE PRINTING OFFICE, 189 NASSAU ST., N. Y.

This is an account by the State of New York of the

land owned by the State of New York, and of the manner in which the same is managed, and of the revenue derived therefrom. It is also a statement of the condition of the land at the close of the year 1907, and of the progress made during the year in the disposal of the same.

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land owned by the State of New York, and of the manner in which the same is managed, and of the revenue derived therefrom. It is also a statement of the condition of the land at the close of the year 1907, and of the progress made during the year in the disposal of the same.

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land owned by the State of New York, and of the manner in which the same is managed, and of the revenue derived therefrom. It is also a statement of the condition of the land at the close of the year 1907, and of the progress made during the year in the disposal of the same.

married on January 6, 1917, and that in October, 1924, he resided at 618 South Spaulding avenue, where he resided for eight years; that he thought he moved away from 618 South Spaulding avenue in 1927, but was not positive.

Plaintiff then called as a witness an assistant credit man who in reply to questions stated that he had been such credit man for twenty years; that his duties were the opening of new accounts and the passing on credit. He was then asked, with reference to his duties, whether he checked up accounts after they had been opened and checked up the ledgers, but defendant objected and his objections were sustained. The witness then testified that the card made out in the name of defendant in application for credit was in the handwriting of the witness, and the card was received in evidence. Its material parts are:

"New account 10/30/24.
Name in full--Charles J. Bronez.
Residence--618 S. Spaulding Ave.
Opened by--Mrs."

The witness then identified another card known as the "office record card," which he stated was signed by Mrs. C. J. Bronez in his presence and in the usual course of business. This card was also admitted in evidence, and its material parts are:

"Name--Bronez, Charles J.
Address--618 S. Spaulding Ave.
Buyers--Mrs. C. J. Bronez."

Further interrogatories as to questions asked the applicant for credit; as to what was stated by Mrs. Bronez at the time she made the application for credit; as to what was done to identify Mrs. Charles J. Bronez with the Charles J. Bronez in whose name the account was opened; as to whether the account ever became active; were objected to by defendant and the objections sustained by the court.

Certain letters dated July 24, 1925, and April 1, 1926, signed Mrs. C. J. Bronez, one of them with the words "618 South Spaulding avenue" following the signature, were produced and

written on January 6, 1917, and dated in October, 1916, as follows:
 "On the 10th of October, 1916, I was called to the office of the
 Chief of Police and was told that the following person had been
 arrested on the 10th of October, 1916, and was being held in the
 city jail."

Thereafter, I was called to the office of the Chief of Police
 and was told that the following person had been arrested on the
 10th of October, 1916, and was being held in the city jail:
 "The following person had been arrested on the 10th of October,
 1916, and was being held in the city jail: [Name redacted]
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 [Other redacted] [Remarks redacted] [Signature redacted] [Date redacted]"

The following person had been arrested on the 10th of October,
 1916, and was being held in the city jail: [Name redacted]
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 [Other redacted] [Remarks redacted] [Signature redacted] [Date redacted]"

The following person had been arrested on the 10th of October,
 1916, and was being held in the city jail: [Name redacted]
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 [Toes redacted] [Scars redacted] [Tattoos redacted] [Mentions redacted]
 [Other redacted] [Remarks redacted] [Signature redacted] [Date redacted]"

identified, but the court on objection refused to permit the witness to testify as to whether the signature to these letters was that of Mrs. Charles J. Bronex.

The witness further testified that Mrs. Bronex became a purchasing customer on this account.

Copies of certain statements showing the items purchased by Mrs. Bronex - defendant having been served with notice to produce the originals - were produced. The court, however, ruled that any secondary evidence of statements mailed to defendant's wife would not be admitted, refused to permit the witness to answer whether these statements were the first permanent record of charges made on account of defendant and refused to admit the exhibits in evidence. Nor would the court permit a witness from the bookkeeping department of plaintiff^{to}/testify what was done with the original statements. These monthly statements of account were addressed to Mrs. C. J. Bronex, 618 South Spaulding avenue, and show the purchases to have been ladies' wearing apparel.

The court also refused to permit a witness for plaintiff to identify plaintiff's ledger sheet showing this account nor would the court permit the witness to answer whether the ledger sheets were a part of the permanent record. Twenty-six letters from plaintiff to Mrs. Bronex concerning payments on account were offered in evidence, and all were excluded by the court. As already stated, the court having excluded this evidence made a finding for defendant and entered judgment thereon.

We think the court erred in excluding this evidence. In Boyle v. Fairfield, 28 Ill. App. 628, this court, construing the same section of the statute under which this suit is brought, stated:

"Under the provisions of this section we think it makes no difference to which of the parties the credit is given; they are both liable."

and of Mrs. William J. Brown.

was to benefit as to whether the agreement in 1933 was

industrial, but the court in opinion refused to permit the wife

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In Arnold v. Keil, 31 Ill. App. 237, the Appellate court for the fourth district stated:

"We think, then, that under this statute the authority of husband or wife to bind both for family expenses is the same, and that it has no relation to, and is not to be considered in connection with, the common law as to necessities. If this is true, then each is the agent to bind the other or to bind both for such expenses by virtue of the family relation existing by reason of marriage."

While in Carson, Pirie Scott & Co. v. Standwood, 225 Ill. App. 281, it was held that the fact "that credit was given to the wife without the knowledge or consent or acquiescence of the husband," was not essential to establish his liability. Houghteling v. Walker, 100 Fed. 253; Hudson v. King Bros., 23 Ill. App. 118; Moyle v. Warfield, 28 Ill. App. 638, and Houck v. Smith & Song, 46 Ill. App. 64, are cited as authorities.

It is true that the Carson Pirie Scott & Co. case is distinguishable from this in that the wife there opened the account in her own name and the testimony as to her admissions was not specifically objected to when offered as not binding on the husband, but if it is true, as stated in Arnold v. Keil, that husband and wife are to be considered as agents, one of the other, to make purchases, it would logically follow that admissions made by either would be admissible. Defendant cites Hyman v. Harding, 162 Ill. 357, but that suit involved a ruby and diamond ring of the value of \$375, which the court held was not a family expense within the meaning of the statute.

For errors in excluding the evidence offered in behalf of plaintiff the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

34154

FRED W. MAIERMAN,
Appellee,

vs.

MOHAWK ELECTRIC CORPORATION
et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

257 I.A. 646

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants, Mohawk Corporation of Illinois and Mohawk Electric Corporation, from a judgment in the sum of \$3,000 entered upon the verdict of a jury, in an action on the case for personal injuries, motions for a new trial and in arrest of judgment having been overruled.

The accident upon which the suit is based occurred September 7, 1926, on the premises at 3729-33 Lincoln avenue, Chicago. The Peabody Coal Company was the owner of these premises which were improved by a two and three story brick building. The second floor of the building was leased from the owner by the Lincoln Cabinet Company, and the north part of this floor, by agreement with the Cabinet Company, was occupied by defendants. The Peabody Coal Company and the Consumers Company were originally made defendants to the action, but plaintiff took a non-suit as to them.

The declaration alleged that at the time in question plaintiff was delivering certain merchandise to defendants; that he went to their office where he was told to deliver the goods and put them on the elevator in a building just inside a certain doorway; that defendants were operating and managing this elevator for the transportation of freight and passengers from the first or ground floor of the building to the second floor; that it was their duty to use due and proper care in the operation of the elevator and the management thereof, in selecting and inspecting appliances therefor; that they disregarded their duty and carelessly and

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STREET AT 2100-2200 BAYVIEW AVE. (SEE MAP)

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Source: *Journal of the American Statistical Association*, 92(439), 1997, p. 1072. Reprinted by permission of the American Statistical Association.

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of full integration of agriculture and the industrial sector.

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U.S. DEPARTMENT OF JUSTICE

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THE UNIVERSITY OF CHICAGO

Approved and forwarded by authority of the President

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negligently allowed the elevator to be hoisted from the ground floor to the floors above in the elevator shaft without having any gate, railing or enclosure on the ground floor around said shaft, and that they carelessly and negligently allowed the bottom of the elevator shaft below the ground floor to remain open and unprotected; that they allowed the first floor of the premises around the elevator shaft to be poorly and insufficiently lighted so that it was impossible for one walking on the ground floor to see the elevator pit; that plaintiff at the request of defendants walked through the door to the place where defendants told him the elevator would be, and that while in the exercise of all due care and caution, plaintiff fell into the bottom of the elevator pit, and while in there defendants carelessly and negligently lowered the elevator in the shaft upon plaintiff, injuring him.

Defendants filed a plea of not guilty and a further plea that they did not own or control the elevator on the premises.

At the close of plaintiff's evidence and again at the close of all the evidence, defendants made a motion that the jury be instructed to return a verdict in their favor, which was denied. They now insist that this motion should have been granted for the reason that the evidence showed plaintiff to be guilty of contributory negligence and for the reason that the proof did not sustain the cause of action alleged in the declaration.

There is very little dispute as to the facts disclosed by the evidence. Plaintiff was engaged in hauling and carting goods from Waukegan to Chicago and drove a Geo truck. In the course of his business he received certain merchandise for delivery to defendants at their place of business. He was accompanied by a helper and arrived at the office of defendants about eleven o'clock in the morning of September 7, 1936. There was a driveway on the north side of the building about 14 or 16 feet wide which extended

east from Lincoln avenue for a distance of about 30 feet, and there was a door at the entrance of the driveway off Lincoln avenue. This door was 30 or 32 feet wide, and it was a door which rolled up and down and opened the full width across. Plaintiff backed his truck into the driveway all the way back to the runway. This runway was a small platform about 7 or 8 inches from the floor, about 3 feet wide and about 14 to 15 feet long, and was a part of the building. At the rear of the driveway, directly east, there was an elevator shaft; an elevator ran in the shaft; it was a general freight elevator and was used by all the occupants in the building. The evidence for plaintiff tends to show that the premises immediately around the elevator shaft were dark. Plaintiff delivered goods here to these defendants on a previous occasion, and at that time he says there was plenty of light. The elevator was a large platform elevator, apparently designed for the purpose of carrying freight. When plaintiff made the previous delivery he put the goods delivered on small trucks standing on the platform, and Mr. Pearson, an employee of defendants, then put these on the elevator.

When plaintiff arrived at the building on the morning in question he walked up the stairway to the office of defendants on the second floor and handed to Mr. Pearson, the shipping and receiving clerk, the freight bill for the goods to be delivered, which were 30 cartons containing radio cabinets. Each carton was 12 inches square one way and about 15 inches long. Plaintiff told Mr. Pearson (as plaintiff testifies), "I have some stuff here for you." He says that Pearson told him he would have to wait because another concern was using the elevator and "we have got to let them unload it first. You go downstairs, and we will be down." Plaintiff then walked back down the stairway, and he and his helper removed the canvas covering the load and lowered the

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tail gate of the truck. The helper stood on the truck and handed plaintiff four or five of the cabinets, which plaintiff held in his arms and turned around and walked in the direction of the elevator shaft. Plaintiff says it was dark; that he could not tell what was before him, but he knew there was an elevator several feet away from the truck; that he knew its location but did not see any door. Plaintiff says:

"It was dark and I could not tell what was before me and I walked up there, feeling my way, to see if I could strike a gate or whether the elevator was there, and the first thing I knew I went down. I don't know what became of the bundles in my arms. I went down into the elevator pit and hit the bottom. It kind of knocked the wind out of me and I struggled around and got up and my elbow was hurt. My right elbow was hurt and I hollered for my helper to help me out and he came to help me. * * * The next thing I heard him hollering, 'Hold the elevator.' I didn't see the elevator, and the next thing I felt the elevator on my back; I screamed and all at once I thought the elevator ceased, kind of released off my back. Then I felt it come down the second time and the next thing I knew I was straightening myself on the floor on the platform."

The testimony of Pearson is to the effect that after the Lincoln Cabinet Company, which was using the elevator, finished unloading, he went over to it and started it down. He says he got within a foot of the loading platform, or of the ground floor, when he heard someone "holler;" that he applied the brakes, went upstairs, got out of the elevator and ran downstairs to the Lincoln avenue side where he met plaintiff's helper. He denies that the elevator struck plaintiff the second time and says that he had the elevator under control and could stop it within two inches no matter how fast it ran. He had run this elevator on many prior occasions.

Defendants say that the evidence does not disclose any duty put upon plaintiff to load the merchandise on the elevator on this occasion. At the time of the prior delivery the goods were not placed upon the elevator, and it is strenuously urged that plaintiff was not in the line of his duty at the time he was injured.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator will then gather information about the problem and the people involved. This information will be used to develop a plan of action. The plan of action will be implemented and the results will be evaluated. If the results are not satisfactory, the plan will be revised and the process will be repeated. The process of the investigation is a continuous one and it is important to keep the information up to date. The investigator will also be responsible for reporting the results of the investigation to the appropriate authorities. The process of the investigation is a complex one and it requires a lot of time and effort. However, it is a necessary part of the process of law enforcement and it is important to do it right.

was before him, but he knew there was no alternative but
to go from the ground; that he knew all about it and had

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negative for each sensitive and drug was determined

There was no other information received from the source.

While the question on this issue of fact is close, we think that there were circumstances from which plaintiff might have reasonably understood that he was expected to place the goods on the elevator. In the first place it was his duty to deliver the goods at defendants' place of business, and that place of business was on the second, not the first, floor of the building. He went to the office of defendants on the second floor and the employee in charge suggested to him that they would have to wait until the other tenant was through with the elevator. It is difficult to see why the use of the elevator should have been mentioned to him at all if it was the intention that he should simply deliver the goods upon the platform. Again, it appears from the evidence that on a prior occasion the goods had been put upon this same elevator for the purpose of taking them to defendants' place of business. As plaintiff suggests, there was no other place provided on which to unload defendants' goods, and the obvious practice was to at least assist in placing these goods on the elevator. Whether in doing so he exercised reasonable care and caution is a very close question, but upon the whole evidence we are inclined to think that the question was for the jury. As was said in Mueller v. Phelps, 258 Ill. 630, a case upon which defendants rely:

"The question of contributory negligence is usually a question for the jury. It only becomes one of law for this court when the undisputed evidence is so conclusive that it is clearly seen that the accident resulted from the negligence of the party injured and could have been avoided by the use of reasonable precaution. (Reidley v. Branshaw, 300 Ill. 425.) Where reasonable men acting within the limits prescribed by law might reach different conclusions, or different inferences could reasonably be drawn from the admitted or established facts, the question of contributory negligence is for the jury. (Illinois Central R.R. Co. v. Anderson, 184 Ill. 394; 2 Taboron on Negligence, 100.)"

Defendants further contend that the instruction to return a verdict for them should have been given because the proof does not sustain the cause of action, which is alleged in the declaration, and cite to this point Van Meter v. Gurney, 240 Ill. App.

...the question on this issue of fact is alone, we think that
...circumstances from which directly might have reasonably
...that he was expected to leave the goods on the elevator.
...it was his duty to deliver the goods at the
...place of business, and that place of business was on the
...first floor of the building. He went to the office
...and the elevator on the second floor and the employee in charge en-
...gaged in his duty until he was told to go down
...the elevator. It is difficult to see why the one
...at the elevator should have been considered to him at all. It was
...the intention that he should deliver the goods down the
...elevator. Again, it appears from the evidence that on a prior oc-
...casion the goods had been put upon this same elevator for the pur-
...pose of taking them to the warehouse, and that it was
...intended that they be taken down the elevator to the
...warehouse, and the elevator operator was at all times ready
...to deliver the goods on the elevator. Whether in taking the
...elevator operator was not inclined to deliver the goods
...was the duty. It was said in Smith v. Green, 100 Ill. 430.

"The question of contributory negligence is usually a ques-
...tion for the jury. It only becomes one of law for this court
...when the undisputed evidence is so conclusive that it is obvi-
...ous that the plaintiff committed the negligence of the party
...injured and could have been avoided by the use of reasonable
...precaution." (Smith v. Green, 100 Ill. 430.) Where reason-
...able care was used by the party injured and the negligence
...of the plaintiff was not the cause of the injury, the question of
...contributory negligence is for the jury. (Smith v. Green, 100
...Ill. 430.)

...the question of contributory negligence is usually a ques-
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...ous that the plaintiff committed the negligence of the party
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...precaution." (Smith v. Green, 100 Ill. 430.) Where reason-
...able care was used by the party injured and the negligence
...of the plaintiff was not the cause of the injury, the question of
...contributory negligence is for the jury. (Smith v. Green, 100
...Ill. 430.)

165; Olsen v. Schultz, 67 Minn. 494, 70 N. W. 779. It is urged that while the declaration alleges that plaintiff was told to put the merchandise on the elevator, the evidence discloses that he was not told to do this, but on the contrary was told to go downstairs and wait. Defendants do not, however, state the evidence correctly on this point. Plaintiff's testimony is that Pearson said, "I will be right down," while Pearson says he told him, "You will have to wait now, because there is another concern using the elevator, and we have to let them unload it first," and further, "You go downstairs, and we will be down." However this may be, if there was a variance in this respect, defendants should have pointed it out in their motion for an instructed verdict, which they did not do. The Van Meter case so holds. The point is without merit.

Defendants next contend that the court erred in refusing to give the jury proper instructions requested by them. One of these refused instructions is as follows:

"The court instructs the jury the landlord, and not the tenant, is charged with the duty of keeping an elevator used in common by all tenants of the building in proper state of repair, and to guard against injury to strangers coming upon the premises."

As there was no contention that plaintiff was injured because the elevator was in any way out of repair, this instruction was not applicable and was properly refused.

The second instruction, of which complaint is made, is as follows:

"The court instructs the jury that under the laws of this state a tenant occupying a portion of a building in which an elevator is installed for the common use of all tenants, is not in duty bound to make repairs of the elevator; nor is it his duty to maintain or keep the elevator in good and serviceable condition nor is it his duty to guard against any accidents on account of lack of light on the floor not leased to him or occupied by him, and if any injury results for failure to keep the elevator in good repair or for failure to protect against any person falling into the opening on the floor not occupied by him, he cannot be held liable for such injury. So that in this case, if you find from the evidence that the injury to the plaintiff was either because of a defective construction of the

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The following are the names of the persons who have been identified as having been involved in the activities of the group:

[The rest of the page contains several lines of extremely faint, illegible text.]

I have been instructed to do the following:

[illegible]

As there was no connection between the two, the investigation was discontinued.

10-10-68

1. The first thing I noticed when I stepped out of the plane was the cold. It was a sharp contrast to the warm, humid air of the tropics. I had heard that the weather in the north was harsh, but I didn't realize just how cold it would be. The wind was biting, and the sun felt like a distant star. I wrapped my coat around myself and shivered. The ground beneath my feet was a mix of dirt and snow, and the air smelled like frost. I took a deep breath, trying to get used to the new environment. The silence was also strange. In the tropics, there was always a low hum of life, the sound of insects and birds. Here, it was quiet, except for the occasional creak of a branch or the distant howl of a wolf. I felt a sense of isolation, a feeling that I was alone in a vast, empty world. But as I looked around, I began to see the beauty of the landscape. The snow-covered mountains were majestic, and the frozen lakes reflected the pale light of the sky. I realized that this was a different kind of beauty, one that I had never experienced before. I took another breath, feeling the cold air fill my lungs. I was here, in the north, and I was ready to face whatever came my way.

elevator, or improper operation of the elevator, or because of the fact that the approaches to the elevator on the first floor were insufficiently guarded, or because of the fact that insufficient light was maintained on the main floor of the building, and that defendants, the Mohawk Corporation of Illinois or the Mohawk Electric Company, were not the occupants of the main floor of the building where the plaintiff was injured, then and in any of these events, you must find for the defendants, the Mohawk Corporation of Illinois and the Mohawk Electric Company."

As this instruction directed a verdict, it was necessary, of course, that it should embrace all the material facts necessary to the verdict directed. One theory of plaintiff in this case is that the elevator was negligently operated, and there is some evidence tending to show that it was. This instruction entirely ignores that evidence and, nevertheless, directs a verdict. It is therefore clearly erroneous. In support of their contention on this point, as on other points discussed in the brief, defendants cite a line of cases, such as Scheninger v. Mann, 219 Ill. 242; Burke v. Hallett, 216 Ill. 549; Smith v. Lederer, 137 Wisc. 479, all of which hold, in substance, that a landlord, who rents different parts of a building to various tenants and retains control of stairways, passageways, hallways, elevator shafts or other portions of the building, has upon him a duty to use reasonable care to keep these places in a reasonably safe condition and that he is liable for injuries which result to persons who are lawfully in the building where he fails to perform such duty. There is no doubt about this proposition as a general rule, but this is not inconsistent with the further proposition that where the tenant has control he is and may be liable for injuries which arise from his negligence. The general rule is stated in 2 Ruling Case Law 1280:

"Irrespective of the liability of the landlord, a tenant who has control of an elevator, on the leased premises, may be liable for injuries arising from its negligent management."

Plaintiff here was not a trespasser. He was on these premises about business connected with defendant corporations. There

On 10/10/54, the following information was received from the Bureau of the Federal Bureau of Investigation, Washington, D.C.:

[illegible][illegible]

1. The first step in the investigation is to identify the problem. This involves gathering information about the situation and determining what is going wrong. 2. The second step is to analyze the problem. This involves breaking the problem down into its component parts and determining the causes of the problem. 3. The third step is to develop a plan of action. This involves determining what needs to be done to solve the problem and who is responsible for doing it. 4. The fourth step is to implement the plan. This involves putting the plan into action and monitoring progress. 5. The fifth step is to evaluate the results. This involves determining whether the problem has been solved and whether the plan was effective. 6. The sixth step is to document the results. This involves writing a report on the investigation and the results. 7. The seventh step is to communicate the results. This involves sharing the results with the relevant parties. 8. The eighth step is to follow up. This involves checking back on the problem to ensure that it has been solved and that the plan was effective. 9. The ninth step is to review the process. This involves evaluating the investigation process and determining what can be learned from it. 10. The tenth step is to improve the process. This involves making changes to the investigation process to make it more effective.

Source: *Journal of the American Statistical Association*, 1990, 85, 10, 1000-1001.

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was an implied invitation to him to come upon the premises, and the evidence was sufficient to justify an inference of an invitation to use the elevator at such time as it was put in the control of defendants. The evidence is undisputed that it was put in their control and that they exercised such control. That control brought with it a corresponding duty - that it should be exercised with reasonable care to the end that plaintiff, who was an invitee and not a licensee, should not be injured. Paschner v. Waken, 231 Ill. 276. The liability of the landlord where he is in possession and control of the premises is not inconsistent with the liability of a tenant when such tenant has exclusive possession and control.

We have preferred to consider this case upon the merits as disclosed by the evidence, although in view of the fact that the bill of exceptions fails to disclose that a motion for a new trial was made, we might, under well-considered decisions of the Appellate and Supreme courts, have refused so to do. G. B. & S. E. H. v. Hazelwood, 194 Ill. 69; Yarber v. C. & A. Ry. Co., 235 Ill. 599; Greenwell v. Hess, 298 Ill. 459; City of West Frankfort v. Pellegrino, 243 Ill. App. 457; Myers v. Verge, 245 Ill. App. 127.

On the question of plaintiff's contributory negligence this is a very close case, but other contentions are without merit on the record.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

34176

MR. W. B. MONTGOMERY and
MRS. W. B. MONTGOMERY,
Defendants in Error,

v.

DR. CHARLES BRANWELL,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

257 I.A. 646²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued defendant in contract for the sum of \$500. The basis of their claim is that on or about May 1, 1927, defendant, who is a dentist by profession, promised to produce for Mrs. Montgomery "a complete set of upper and lower plates, and that said dental work would be prepared and fully completed within six (6) weeks thereafter to the entire satisfaction of the said plaintiff, Mrs. W. B. Montgomery, and that the said plates would be workable and usable." The statement of claim alleges that at the request of defendant \$500 was paid after the plates had been prepared and upon the promise of defendant that it would be returned to plaintiffs if the dental work was not usable and entirely satisfactory to Mrs. Montgomery.

Defendant in his affidavit of merits denied that he made the promise alleged and filed an offset claiming the sum of \$600 as the balance due to him for a second lower plate prepared for Mrs. Montgomery at the request of plaintiffs. To this offset plaintiffs filed an affidavit of merits, denying that they had agreed to make payment as alleged and again setting up in substance the facts alleged in the statement of claim.

There was a trial by the court and a finding for plaintiffs on the statement of claim and against defendant on the

effect, and a judgment was entered in favor of plaintiffs for \$500. The only question in the case is whether the finding and the judgment are against the manifest preponderance of the evidence.

The evidence tends to show that defendant, who is a skilful dentist, met plaintiffs in 1926. Mrs. Montgomery had much trouble with her teeth prior to this time and had lost all the teeth in her lower jaw. A mutual friend introduced her to defendant and suggested that he might be able to fit her. He said he would be pleased to try and that he specialized along that line. As a result of that conversation, plaintiffs went to his office, and Mrs. Montgomery says she asked him if he could make her a set of teeth that would wear, and told him that she had been to a number of dentists; that she was after a set of teeth that she could wear and that would keep the lowers in; that he looked them over and said, "I can make you a set of teeth in six weeks that you can eat anything, beefsteak or anything." He says he told her the price was \$500 for a set of uppers and lowers and that she said she didn't like to pay that much money for a set of teeth until she knew they were going to be satisfactory, but that if they were satisfactory it was worth it; if they were not, it wasn't worth it.

Mr. Montgomery testifies that he was present when defendant was consulted about the teeth for Mrs. Montgomery; that the doctor made an examination of her mouth and said, "Yes, I can make a set of teeth there that will be perfectly satisfactory, a set of teeth that she could eat anything with;" that the witness said, "How much will it cost, doctor," to which defendant replied it would be \$500. He says that he then told the doctor that they theretofore had several dentists and never got a set of teeth that were satisfactory or hardly usable, and that they were in a frame of mind not to pay for a set unless it was satisfactory. He further says, "The doctor replied that he guarantees his work, and stands back of same just like

Marshall Field," to which the witness said that was the only way they would do business; that when they were satisfied they would pay for the teeth; that the doctor replied, "Yes, sir. Absolutely."

Thereafter the teeth were made and thereupon the trouble began which led to this lawsuit. May 28, 1927, after the teeth were made and before delivery of the same, the doctor addressed a letter to Mr. and Mrs. Montgomery, in which he said:

"Just a word regarding Mrs. Montgomery's dentistry. I was very happy when you people came in for I consider you both very high class and the type of people I am happy to work for.

For that reason I know you appreciate our position in doing business. We have always carried our business along the lines of Marshall Field. We have worked hard for a reputation and do not intend ever to send our work out unless compensated for same at the time of delivery. We do intend to however and have always stood by our work and refunded the price charged if at any time our patients are not perfectly satisfied in every case after a fair trial.

For that reason I am sure you would be more than pleased to bring your check of Five Hundred Dollars Saturday, your next appointed time as I know you understand that if we did other than this we would have dentistry distributed all over the United States which is absolutely impossible when we are so prompt in the payment of all our obligations and hope to be just as long as we practice dentistry."

About June 15th thereafter, a check was handed to defendant for \$500 and the teeth delivered to plaintiffs. Mrs. Montgomery testifies that she could not wear the teeth for any length of time; that she put them in when she went to see the dentist "to let him see where they marked my mouth, that is all I could do, and I had to do that all the time, my mouth was almost raw, that is, the lower jaw, not the upper, the lower." She says that she followed the dentist's instructions specifically but that she could not wear the teeth an hour or two at any one time; that she made regular calls at the doctor's office until December, 1927, when she told him that she didn't think she would come back on the last of the holidays. He replied that he was going to California and that he would give her "a ring" when he came back. She phoned him again in April, 1928, and went several times to his office. He said he was going to California

and would call her when he came back.

Defendant had better success in pleasing Mr. Montgomery with some work which he was employed to do for him in the meantime. A gold upper plate was made and 18 lower teeth constructed, with which Mr. Montgomery was very well satisfied and for which he paid Dr. Bramwell \$8,100. The Montgomerys were in Florida during the winter, and upon their return Mrs. Montgomery delivered the teeth to defendant. She says she couldn't wear them; that she expected a telephone call from him but he didn't call; that she did not take the teeth to Florida; that she could never wear them because they hurt her mouth, sores came on the skin and she just couldn't wear them. At the time of the trial she was wearing a set of teeth made for her by another dentist before she went to Dr. Bramwell; she had three sets made before she went to Dr. Bramwell, and still another set was being made for her by another dentist at the time the trial was held.

Defendant does not specifically deny the conversations to which plaintiffs testify. He says that when he examined Mrs. Montgomery's mouth he found that she had no ridge at all on the lower and a fairly good upper where he could get good suction; that he told her it was impossible to wear a lower with comfort because she had a flat mouth; that he told her there would be no charge for running up models but it would cost her \$300 if she took them from the office and they were satisfactory, and that was the reason why he wrote the letter to plaintiffs. He says:

"If they are satisfactory at the time to the party, they are never returnable, but we will give them our service. I explained to Mrs. Montgomery that I will have to charge \$300 at that time."

Defendant says he told Mrs. Montgomery that he did all he possibly could; that if she wanted to take the teeth she would have to pay \$300, and from that time on he would do everything he could to make them satisfactory, because she would continually have

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trouble; that he serviced the teeth almost a year afterwards; that he told her to use camphor and "we would work together and try to establish a solid, hard - the same as wearing a new pair of shoes, we would form a thickened hard ridge, which isn't so sensitive. I said, 'You may not be able to wear it,' I said, 'you may have a sore in your mouth, but if you come down I will treat it and I will try and form a callous.'" He says that he did not tell Mrs. Montgomery that if she was not satisfied with the set of teeth she could come back and get the \$500, but that he would adjust at any time. He says that at the last meeting he was very much encouraged with the state of the ridge; that he thought eventually he could get a ridge where she could articulate and get chewing surface; that if Mrs. Montgomery would come back for treatment, he could get the plate, the best that is possible, because he had an absolutely perfect impression, but that with his 20 years of experience he was afraid that Mrs. Montgomery would always have trouble. He says that the teeth were as near satisfactory as it was possible to make them; that he felt that she was getting along nicely and felt that he could alleviate the pain. He says that by the paragraph in the letter which referred to Marshall Field he meant that if patients were not perfectly satisfied after a fair trial, he would give them the money back.

This review of the testimony in the case, we think, discloses that the only issues here are issues of fact. Defendant argues that by reason of plaintiffs giving a check after receiving the letter of May 26th, that letter must be taken to be the contract between the parties and that by its terms the price was to be returned only in case Mrs. Montgomery was not satisfied "aff a fair trial." He also argues that Mrs. Montgomery did not give the teeth a fair trial.

We do not think this contention as to the letter

defendant stating the whole contract can be sustained, but if that theory is accepted, there would remain the issue of fact as to whether she did or did not give the teeth a fair trial. Mrs. Montgomery testifies as to the custom of the house of Fields. She says she has traded with Marshall Field and that the usual practice of that house is, "if the goods are not satisfactory it is returned and the money refunded." We think it is only fair to assume the trial court was of the opinion that the knowledge of the lady as to the custom of Fields would be entitled to somewhat greater weight than that of defendant.

At any rate, on all these issues of fact, the finding of the trial court who saw and heard the witnesses is entitled to the same consideration from a reviewing court as the verdict of a jury. We are not able to say that the finding is manifestly against the evidence. Chicago Union Traction Co. v. O'Donnell, 113 Ill. App. 259; Lyons v. Stroud, 257 Ill. 350.

For that reason the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is active in the United States or whether it is merely a front organization for the Cuban Government.

LEONARDO DA VINCI, 1452-1519. *Portrait of Leonardo da Vinci*. 1503. Oil on wood. 15.7 x 11.8 cm. The Louvre, Paris.

1. 1. 1.

4. 1990年12月1日，在“中国”号上，中国船长与船长在甲板上相遇，双方都感到惊讶。中国船长说：“我们在这里相遇，真是缘分。”船长说：“是啊，我们在这里相遇，真是缘分。”

34088

JOHN TOMASZKIEWICZ, a minor, by
Anna Bartko, his mother and
next friend,

Appellee,

vs.

CITY OF CHICAGO, a Municipal
Corporation,

Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

257 I.A. 646

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, by his mother and next friend, brought an action against the City of Chicago to recover damages for personal injuries claimed to have been sustained by him by being struck by one of the City's trucks. There was a verdict and judgment in plaintiff's favor for \$20,000 and the defendant appeals.

The evidence is to the effect that about three o'clock on the afternoon of November 30, 1937, plaintiff, who alleged in his declaration that he was about eight years old, was struck by a motor truck being driven south in Leavitt street, at or near the intersection of that street with Canton street, in Chicago.

After a careful examination of all the evidence in the record we are unable to say with any degree of certainty where or how the accident happened. The evidence is all to the effect that the truck did not slacken or stop but continued south in Leavitt street after the plaintiff was struck. Most of the contest on the trial was whether the truck was a garbage truck used by the City of Chicago, or whether it was some other truck designated by two other witnesses as a lumber truck. The witnesses were not interrogated specifically by counsel for either side, so as to bring out the facts sufficiently for us to understand how plaintiff was injured - what he was doing or where he was going. There is some evidence that he was returning from school but there is no evidence as to where the school was located nor in which

direction he was going. Some of these deficiencies seem to be supplied in the briefs but we are unable to find evidence on many matters which we consider essential.

There is also uncertainty as to where the several witnesses who testified were at the time of the accident. For example, it is not of much value for a witness to say he was on Leavitt street unless the specific place is mentioned so that the court can understand and comprehend the situation. Liability for an accident cannot be predicated upon suppositions or speculation. Nor is the evidence sufficiently certain that plaintiff's injuries were as severe as one of the doctors indicated by his testimony.

The evidence shows that plaintiff was struck and sustained a fracture of the skull; that he was immediately taken to a hospital where he was treated by a surgeon; that he remained at the hospital nine days; that he was then taken home and was confined to his bed about five weeks; that three months after the accident he returned to school. The doctor who performed the operation, called by plaintiff, testified that at the time of the trial in May, 1929, about nineteen months after the accident, "actions and conditions (of plaintiff) are those of a perfectly normal child." Another doctor gave testimony to the effect that the child, since the accident, was troubled with epilepsy and the child's mother also testified in substance that the boy was still in a very bad state of health. Although plaintiff was going to school he was not called as a witness, nor was the teacher or anyone from the school who would know about his condition. And while the principal dispute was as to whether the truck in question was a City garbage truck or a lumber truck which did not belong to the City, no attempt was made, so far as the record discloses, to show whether any of the City's garbage trucks were at Leavitt and Canton streets on the

afternoon of the accident. We think it might not have been difficult for the City to adduce some evidence on this question. We think it would serve no useful purpose to point out in detail the indefiniteness of the testimony of practically every witness as to where they were at the time of the accident and as to how the accident happened; but upon a retrial of this case all these matters ought to be cleared up without difficulty.

Complaint is made by the City to instruction number one given at plaintiff's request. Two complaints are made, first that the jury were told in effect that before plaintiff could recover the jury must believe from a preponderance of the evidence that he was in the exercise of due care and caution "for one of his age and experience," and it is complained that the jury should have taken into consideration the intelligence and capacity of the plaintiff as well as his age and experience. The other objection made is that it copied the allegations of the first count of the declaration and then told the jury that if the plaintiff had proven his case as alleged in that count by a preponderance of the evidence, their verdict should be for the plaintiff. The copying of the allegations of a declaration in an instruction was criticized by the Supreme Court in the case of Meivitz v. Chicago Rapid Transit Co., 327 Ill. 207, and by this court in Coffin, Adm'r. v. City of Chicago, number 32997, not reported. But for reasons stated in those cases, the judgments were not reversed on account of such faulty instruction. In the Coffin case, in discussing a case somewhat similar to the instant case, we said that such an instruction ought not to be given in any case, and that "If we were of the opinion * * * that the question of liability was a close one, we would not hesitate to reverse it on account of instructions numbers 9 and 13; but we think the facts were not at all complicated

and there was little dispute in the evidence. Under these circumstances we think that the jury was not misled or confused to the prejudice of the defendant."

Upon a retrial instruction number one should not be given; and the omitted elements as to the intelligence and capacity may be readily supplied when the case is again tried.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McCurely, P. J., and Watchett, J., concur.

and there was little interest in the evidence. When these witnesses
stated we think that the jury was not misled as to the
reliability of the testimony.

There is a technical instruction which we should not be
given; and the subject should be in the testimony and possibly
not be treated as a matter of fact.

The testimony of the witness is not at all correct in
the testimony and the facts.

REVEREND THE PRESIDENT,

REVEREND THE PRESIDENT, 11th Avenue.

In the Matter of the ESTATE
OF PETER J. WILSON, Deceased.

LOUISE WILSON, Executrix of the
Estate of Peter J. Wilson,
Deceased,

Appellant,

vs.

CHARLES WILSON, Claimant Below,
Appellee.

127
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

257 I.A. 346⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On March 19, 1929, Charles Wilson filed his claim against the estate of Peter J. Wilson, deceased, which was then being administered by the Probate court of Cook county. The claim was based on what was alleged to be a promissory note dated May 9, 1906, for \$3,000, due 22 months after date, to the order of the claimant, Charles Wilson, and signed by Peter J. Wilson, the deceased. The note was written on the ordinary printed blank and bore interest at six per cent after date; it contained a power of attorney to confess judgment at any time after date. After a hearing the Probate court disallowed the claim. An appeal was taken to the Circuit court, where pleas were filed denying the execution of the note and averring that it was barred by the statute of limitations. There was a jury trial and a verdict and judgment in plaintiff's favor for \$2190.57, and the executrix of the estate of Peter J. Wilson, deceased, appeals.

Charles Wilson will hereafter be designated as claimant, and the executrix of the estate as defendant.

To obviate the defenses interposed by the two pleas plaintiff offered evidence tending to show that Peter J. Wilson had executed the note and that he made the following payments: October 20, 1906, \$150; May 4, 1914, \$100; May 7, 1921, \$125; and February

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the Communist Party in the United States.

THE SECRET OF THIS WAS REVEALED IN A RECENTLY RELEASED
DOCUMENT THAT WAS OBTAINED BY THE NEW YORK TIMES.

SECRET

10 pages in English. It is a copy of the original document.

THE UNIVERSITY OF CHICAGO

RECEIVED AT THE OFFICE OF THE ATTORNEY GENERAL
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27, 1936, \$175. Witnesses for the defendant familiar with the handwriting of the deceased testified that the signature on the note in suit was not the signature of the deceased. Further evidence was introduced on behalf of the defendant to the effect that Peter J. Wilson was a man of considerable means, engaged in conducting a milk business in Chicago for more than 30 years; that he always carried a bank account, paid promptly all his bills by check and sold his interest in the milk business in 1936 for \$64,000. Other evidence was offered, some of which was excluded, tending to show that he had no debts and that no other claim was filed against the estate.

Thomas J. Bly, a witness for claimant, testified that he was 66 years old; that his "business or occupation is mostly real estate;" that he knew Peter J. Wilson (who will hereinafter be called the deceased) since 1886, at which time the deceased was employed as a salesman for William Thompson in delivering milk in Chicago; that the witness knew Charles Wilson, the claimant, since 1885; that at that time claimant was running a restaurant and that the deceased delivered milk to claimant at his restaurant; that deceased went into the milk business for himself in 1891 or 1892; that on May 9, 1895, he was in the office of A. Gray, who was engaged in the real estate business at 79 Clark street; that claimant, the deceased, Gabriel Devoust and a bookkeeper were present; that he saw the deceased there execute the note in suit; that he had heard several conversations between claimant and the deceased which took place about a week prior to the time the note was signed; that there were some money disputes between the Wilsons which were finally amicably settled; that he heard claimant say to deceased, "You owe me a little more, (then \$3,000) but I will take it;" that the deceased replied, "I owe you \$3,000 - that we have agreed upon;" that a Mr. Sumner who was present made out a note for \$3,000 and handed it to deceased who said he would go out to see a lawyer

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before he signed it; that he went out and came back in a little while with another note, saying he would not sign the first note because it provided for \$75 attorney's fees; that deceased then presented the note in suit which deceased had had made out while he was out of the office, "which did not provide for attorney's fees," and that deceased then signed the note. (\$30 attorney's fees is written in, in the blank space in the confession of judgment clause.)

The witness further testified that he kept the note in his possession, by agreement of the Wilsons, and endeavored to collect it from the deceased; that he 50 times demanded payment from deceased; that the note was in the witness' possession practically all the time from its execution until the trial, which took place in 1929, - more than 35 years; that the deceased made the first payment on the note in 1905 and the payment was written on the back of the note by Charles Wilson, who called at Gray's office for that purpose; that the payment was \$150 which deceased made by first giving witness \$50 in cash and a few days before the payment was endorsed on the note he came in again with the \$100; that at the time deceased made part of the payment by check it was not deceased's check but a check he had apparently obtained from some of his customers; (the name of the maker of this check does not appear); that the witness had the check cashed and later on, when claimant came in, gave the money to him and the endorsement was made; that the next payment of \$100 was in 1914 in Gray's office in cash by deceased to claimant, in the witness' presence; that the witness took the note out of the box and the claimant endorsed the payment on the note; that the witness made another demand for payment about two years after the \$100 was paid. Sometimes the witness would write the deceased demanding payment and the latter would come in and talk the matter over in the witness' office, where he had

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desk room in E. W. Scanlan's office then in the Chamber of Commerce building; that the witness also maintained connection with Gray's office; that the deceased came to witness' office and the witness asked him for payment and deceased replied he would "get around to that," that he was working in a milk company on a large scale, "that it took all the ready cash he had to complete that organization and keep it in shape;" that Charles Wilson was not in any particular need of money, and that deceased was going to see claimant and have him hold off.

The witness further testified that the deceased's company was the Forest Glen Creamery Company, that it was organized in 1906 or 1907 with a capital stock of \$80,000, then increased to \$50,000, then to \$100,000, then to \$200,000, and now is \$275,000; that in 1931 deceased owned a majority of the stock and controlled the milk company; that deceased made the next payment of \$125 May 9, 1931, in Scanlan's office; that the witness, Gabriel Payson, the two Wilsons, a lawyer and Scanlan were present at the time; that the payment was in cash; that the money was given to Charles Wilson and the witness took the note out of the box, handed it to Charles Wilson, who then endorsed the payment on the note. The witness further testified that the next demand he remembered making on Peter J. Wilson for payment was in February, 1935, when three different payments were made, aggregating \$175; that shortly before this time claimant Charles Wilson was injured by an automobile accident and was in the American Hospital in Chicago; that the witness called on him and the next day called up Peter Wilson and told him Charles was in the hospital and needed money; that the next day Peter Wilson came out and gave witness \$40 which he took to the hospital and gave to Charles; that when Peter made this payment he said he would go out and see Charles; that Peter later said that he went out and reported that Charles had left the hospital; that

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some time afterwards the two Wilsons came to the office and Peter gave Charles some money; that Charles then endorsed it on the note, the endorsement being made in Scanlan's office; that a number of people were present; that that was the last payment he knew of.

The witness further testified that before the World's Fair in Chicago, which was a few years before the note in question was made, Charles Wilson had loaned money to Peter to enable the latter to start in business for himself; that Charles Wilson drew this money out of the safety deposit box, in which he had \$4,000; that after the payment was made in February, 1926, the witness made one or two more demands for payment. The following then appears:

"Q. And what was said - who was present, rather, first? A I don't remember. I ain't right certain about that, whether he came down or whether I went up there. I wouldn't say about that. I wouldn't say that I was correct there. My memory is very bad on that, because I only made demand once or twice and then I dropped it, after 1926. Before 1926 I did, but not after."

On cross-examination the witness was asked: "Mr. Ely, you testified that you are in the real estate business. What was the last time that you represented any seller or purchaser in the sale of property?" Upon objection the court stated they were not interested in that question. The witness then stated that in addition to the real estate business he did special work for lawyers, on records mostly. Upon being asked how much time he spent on that work, the court, upon objection, held that the question was immaterial. Counsel also sought to show, as affecting the credibility of the witness, that he was a professional witness, but was not permitted to do so. We think the ruling was wrong.

We think that in the instant case great latitude should have been given counsel in cross-examining this and other witnesses. From the testimony of the witness, Ely, which we have above rather

[illegible]

fully set forth, it appears that he remembered in detail all the matters that took place in reference to the note, although it was made about 34 years before the time his testimony was given, but was rather hazy on what took place after the last payment, which he said was made in February, 1926. Counsel for the defendant should have been permitted to inquire of this witness in considerable detail as to his occupation. People v. White, 251 Ill. 67; People v. Bond, 261 Ill. 490; People v. Schultz, 260 Ill. 46.

In the White case the court said (p. 73): "It is also proper to cross examine a witness as to his occupation, and other matters which will enable the jury to determine what weight ought to be given to his testimony. This witness testified that he was a bar-tender and that he had tended bar for the defendant for 15 months. The prosecution then showed, by further cross-examination, that he had put in more time working for gambling houses in the last fifteen years than in tending bar or running a saloon; that he had been employed in the gambling houses of the city, operating gambling tools and devices; that the greater part of his business had been running gambling devices."

And in the Schultz case the court said (p. 42): "It is proper to examine a witness as to his occupation, and other matters which will enable the jury to determine what weight ought to be given to his testimony (People v. White, 251 Ill. 67), but as a usual rule it is not proper to bring out in evidence the commission of other offenses by the accused."

While the cases cited are criminal cases, we think the rule certainly ought to be as liberally applied to witnesses who testify in civil cases.

Gabriel Davoust, called by claimant, testified that he was 57 years old. He testified in detail as to the making of the note and the payments alleged to have been made, his testimony

11-12-1934

being substantially to the same effect as that given by Ely.

Since there must be a re-trial of this case, we think it unnecessary to detail the testimony given by this witness, except to say that his testimony and the testimony of the witness Ely seem almost incredible.

The defendant also offered in evidence some 800 personal checks of the deceased, all of which are signed by the deceased and cover a period of about three years before the deceased sold out his milk business, and counsel for the claimant, in his brief says that the "jury had the right and opportunity to examine and compare the signature on the note with the signature on each of the eight hundred or more cancelled checks in addition to believing the testimony of Messrs. Ely and Havest, the two only living eye-witnesses to the signature on the note." Counsel for the defendant contend that a comparison of the signature on the note with those on the checks discloses the fact that they were not written by the same person and some claimed differences are pointed out. We have examined the signature on the note and compared it with the signatures on the checks and are of the opinion that they do not appear to have been written by the same person. There is other evidence in the record offered by both sides which we think it unnecessary to mention here.

Defendant contends that the court erred in permitting the other witness, Ely, to testify because there was evidence in the record that tended to show he would receive something in case a favorable judgment was had. We think there is no merit in this contention. Section 2, chapter 81 of the statutes, which bars one who is directly interested in the event of a suit or proceeding from testifying when the adverse party defends, as an executor, etc., has no application here. The interest in the outcome of a suit or proceeding mentioned in the statute that will render a witness

incompetent must be some interest in the judgment or decree that will be entered in the immediate suit or proceeding. Britt v. Darnell, 315 Ill. 386. The witness, My, was a competent witness.

Defendant further contends that claimant failed to prove his case because it was not proved that (1) the note was signed by Peter J. Wilson; (2) that there was no proof that Charles Wilson owed the note, and (3) that the proof of ^{the} payments did not toll the statute of limitations. We think there is no merit in any of these contentions. All of the evidence tends to show that Charles Wilson owned the note and witnesses testified they saw Peter Wilson sign it and that Peter Wilson made payments on the note which were endorsed on the note in his and their presence. Nor is there any merit in the contention that the note was discharged because there were material alterations shown to have been made in the endorsements on the back of the note. The alterations made in the endorsements, as testified to by a witness for the defendant, were not of such a character as would affect the note.

Complaint is also made that the court erred in permitting witnesses to refresh their recollections by examining the dates of the payments as shown by the endorsements on the note. We think there is no merit in this contention. We are also of the opinion that the witnesses' recollections were not refreshed by looking at the endorsements as they testified; nevertheless the testimony was proper because the witnesses testified in substance that the endorsements were made on the dates that appear on the back of the note and that they were present and saw them written on the note. Loch v. Pearson, 219 Ill. App. 468. Complaint is made that the court erred in refusing to receive competent evidence offered by defendant as to Peter J. Wilson's financial condition

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Subject: _____

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Department of Psychology, University of Illinois at Chicago, Chicago, IL 60607

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10-11-1964

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THE UNITED STATES DEPARTMENT OF THE INTERIOR
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and his habit of making prompt payment of debts. Some of this offered evidence was admitted and some excluded. We think all of it should have been admitted.

In view of the age of the note we think considerable latitude should be permitted in receiving evidence tending to show that there was no reason why the note should not have been paid long ago if it were genuine.

Complaint is made that the court erred in giving instructions numbers 4, 5, 6 and 7, requested by the claimant. By instruction number 4 the jury were told that "the opinions of a witness as an expert are merely advisory," and are not necessarily binding on the jury and they might reject or accept such an opinion as, in their judgment, they saw fit. We think this instruction was erroneous. The testimony of an expert is to be considered the same as that of any other witness.

Instruction number 5 told the jury that if they found from the evidence that the deceased executed the note and made payments on it within ten years after the date of maturity, and that the last payment was made within ten years prior to March 19, 1909, they should find for the claimant. We think this instruction was misleading and prejudicially affected the defendant. If the jury found from the evidence that Peter J. Wilson had made the note and had made a payment on it within ten years before the suit was brought, it could not be barred by the statute of limitations. We think there was no error in instructions numbers 6 and 7. We think the latter instruction, together with the admission of the court, obviated any objections that might be made to the introduction of the note with the matter submitted upon it by the clerk of the Probate court.

Complaint is also made that the court erred in refusing

to give instruction number 1, requested by defendant. We think there was no error in the ruling. The instruction was to the effect that if the jury believed that alteration had been made in the dates appearing on the endorsements they should find for the defendant. The evidence did not warrant any such instruction. The alterations, as testified to, were not of such a character that the note would be destroyed.

The court in entering up judgment awarded execution. After the term had expired at which the judgment was entered, the court corrected this so that it would be collected in due course of administration. This was a proper procedure. DeWolf v. Herliker, 190 Ill. App. 116; DeWolf v. Herliker, 193 Ill. App. 58.

For the errors indicated the judgment of the Circuit court is reversed and the cause remanded.

REVERSED AND REMANDED.

McSursly, P. J., and Hatchett, J., concur.

the first investigation conducted by the FBI, the results of which were reported to the Attorney General in a letter dated June 1, 1964. The results of this investigation were reported to the Attorney General in a letter dated June 1, 1964. The results of this investigation were reported to the Attorney General in a letter dated June 1, 1964.

34151

FRED W. MOXEY,
Appellant,
vs.
IZOLA MOXEY,
Appellee.

113
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

2571A.647

MR. JUSTICE O'DONNELL DELIVERED THE OPINION OF THE COURT.

By this appeal Fred W. Moxey seeks to reverse an order of the Superior court of Cook county requiring him to pay \$55 a month for the support of his two minor children, instead of \$35 a month as provided in his decree of divorce entered in his favor and against the defendant, Izola Moxey.

July 1, 1929, a decree of divorce was entered in the Superior court of Cook county dissolving the marriage between complainant and defendant. The decree found defendant had wilfully deserted complainant. There were two minor children of the parties and it was decreed that complainant pay \$35 a month for their support during minority. Apparently the children were living with the defendant, their mother.

The record discloses that on August 29, 1929, an order was entered continuing the defendant's motion for an order to increase the amount to be paid by complainant for the support of the minor children. Further orders were entered continuing the matter until November 20, 1930, and the record discloses that on that day a verified petition was filed by the defendant, wherein it was alleged that in the divorce proceeding it was agreed between the parties that complainant was to pay \$50 a month for the support of the minor children, but through mistake and inadvertence the decree provided for only \$35 a month. Other matters were set up which we think it unnecessary to refer to here.

Complainant filed his verified answer on December 2nd,

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in which he denied certain allegations made in defendant's petition but did not specifically deny that there had been a mistake in entering the decree providing for \$35 a month instead of \$50. The answer simply alleges that the draft of the decree was submitted to counsel for the defendant before it was entered. On December 2nd the court entered the order as stated, increasing the amount complainant was required to pay for the support of the minor children to \$55 a month.

Complainant contends that the order was unwarranted because there was no material change in the condition of the parties since the decree of divorce was entered, July 1, 1929. A number of authorities are cited which hold, in effect, that the court is not warranted in changing the allowance for alimony after the entry of the decree unless the condition of the parties has changed since the decree was entered. None of these cases is in point. The allowance in the decree here is for the support of complainant's minor children and it is alleged in defendant's petition that there was a mistake in the amount as entered in the decree. This is not denied by the complainant except inferentially. Counsel for complainant further say that the order was unwarranted because there was no evidence offered on the hearing but that it was heard on the petition and answer, and we find in the abstract of record a statement to this effect, but no such matter is in the record. The order states that the matter came on for hearing; that both parties were present in open court in person and represented by counsel, "and the court having heard the evidence adduced by the respective parties" then makes certain findings and decrees the increase in the allowance for the support of the minor children. There is no certificate of evidence in the record, so we must presume that the evidence was heard as the record states, but in any event we think we would not be warranted in disturbing the order

1. The first question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

2. The second question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

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7. The seventh question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

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9. The ninth question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

10. The tenth question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged beyond a reasonable doubt. The evidence is sufficient if it is reasonable to conclude that the defendant is guilty of the crime charged beyond a reasonable doubt.

because the court was warranted, under the petition and answer, in increasing the allowance.

The order of the Superior court appealed from is affirmed.

AFFIRMED.

McSorely, P. J., and Hatchett, J., concur.

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34245

CLYDE ROSEBOOM,
Appellee,

vs.

GEORGE E. DEANBACH,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO,

257 I.A. 647²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On October 11, 1927, the plaintiff landlord caused judgment by confession to be entered on a lease against the defendant tenant, the claim being for rent due for the months of May, June, July, August, September and part of October, 1927. The judgment was for \$715, which included \$71.30 attorney's fees. Afterwards the judgment was opened up on motion of the defendant and he was given leave to defend. He filed his affidavit in support of his motion, which the court afterwards ordered to stand as his affidavit of merits. There was a jury trial and at the close of all the evidence the court instructed the jury to find in favor of the plaintiff, the judgment by confession was reduced to \$655, and the defendant appeals.

The lease devised an apartment in a building at 1708 Touhy avenue, Chicago, for a period beginning May 1, 1926, and expiring April 30, 1928. The execution of the lease was between the defendant and Leopold & Hicks, plaintiff's agents. It contained a provision which authorized the defendant tenant to cancel the lease on April 30, 1927, provided he gave sixty days notice in writing.

The evidence shows that plaintiff owned an apartment building consisting of some eighteen apartments, including the one occupied by the defendant; that defendant had occupied an apartment in the building under a prior lease and that all of his dealings under the lease in question were with Leopold & Hicks. The defendant testified that about March 7th he called at the office

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DIVISION OF INVESTIGATION

357 L.A. 847

RE: JAMES EARL RAY, ALIAS; EDWARD GEORGE BREMER, JR., VICTIM.

On January 11, 1947, the following information was received by the Chicago office from the Los Angeles office: The Los Angeles office has advised that it has received information from a confidential source that James Earl Ray, alias, is in the Los Angeles area. The Los Angeles office is currently conducting an investigation into the activities of Ray, alias, and is seeking to locate him. The Los Angeles office is also seeking to identify any other individuals who may be associated with Ray, alias, and is requesting that the Chicago office assist in this effort. The Los Angeles office is also seeking to identify any other individuals who may be associated with Ray, alias, and is requesting that the Chicago office assist in this effort.

The Los Angeles office is currently conducting an investigation into the activities of Ray, alias, and is seeking to locate him. The Los Angeles office is also seeking to identify any other individuals who may be associated with Ray, alias, and is requesting that the Chicago office assist in this effort. The Los Angeles office is also seeking to identify any other individuals who may be associated with Ray, alias, and is requesting that the Chicago office assist in this effort.

of Leopold & Hicks and told their representative, Mr. Lyle, that although he was about seven days late in giving the notice provided in the lease for the termination of it, he desired to move not later than April 30, 1927, because he had found another apartment that his wife thought more desirable; that he did not want to move unless he was released from his obligation under the lease in suit; that Mr. Lyle told him it would be all right, that he could go ahead and move and that it was not necessary that defendant be given a written release. Defendant further testified that on the next day, March 8th, plaintiff, who occupied an apartment in the same building, came to defendant's apartment and discussed the fact that defendant was to vacate the apartment; that plaintiff said she was sorry defendant was going to move; that on that same day Leopold & Hicks put up a "for rent" sign in the apartment; that about April 13th defendant vacated the apartment and paid his rent up to April 30th.

Defendant called plaintiff under section 33 in an endeavor to elicit from her, among other things, what was said March 8th in defendant's apartment about defendant vacating the premises, but upon objection of counsel for plaintiff this evidence was erroneously excluded. The defendant also endeavored to show that Leopold & Hicks had authority to release defendant from his lease, but this was objected to and the objection ^{erroneously} sustained. Defendant might have been able to show that the agents were authorized to release him from the lease. While the lease provided that the sixty days notice required by the tenant in case he desired to cancel the lease on April 30, 1927, must be in writing, this provision might be waived by parole. Wolf v. Ladd, 220 Ill. App. 312; Clark v. Stevens, 221 Ill. App. 233; and of course it is the law that a written lease may be terminated by an oral agreement. Alschuler v. Schiff, 164 Ill. 298.

Under the evidence in the record, if defendant's

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counsel had moved for an instructed verdict, the motion should have been allowed. The uncontradicted evidence was to the effect that plaintiff herself had acquiesced in the termination of the lease when she called at defendant's apartment on March 8th. But the defendant, not having made such motion, we think we would not be authorized in entering judgment here in his favor.

But plaintiff contends that the defendant was limited in his defense to that set forth in his affidavit of merits, where it was averred that Leopold & Hicks were authorized, on behalf of plaintiff, to arrange for the termination of the lease, and that there was no evidence of this fact. This was not the objection made by counsel for plaintiff on the trial. It is elementary that such an objection not having been made on the trial cannot for the first time be made in the court of review. Moreover, we think the evidence was sufficient because, as stated, it was to the effect that plaintiff had acquiesced in the termination of the lease.

On a retrial of the case all of the evidence ought to be admitted that would tend to show that Leopold & Hicks had authority to terminate the lease. The evidence may be that the dealings between the defendant and Leopold & Hicks were such as would warrant the conclusion that they were authorized to terminate the lease.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

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and he mentioned that his father had been killed during the war.

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There was no evidence of this fact. This was not the opinion made by counsel for plaintiff in the trial. It is necessary that such an objection not having been made on the trial cannot for the first time be made in the course of review. However, we noted the evidence was entirely unconvincing, we stated, it was in the state of the case.

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34011

JOHN F. AMBERG, for the use of
CLARENCE LAUTEN,

(Plaintiff) Appellee,

v.

NICK MAHERAS,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 28, 1930

MR. CHIEF JUSTICE SILLON delivered the opinion of the court.

The plaintiff, John F. Amberg, for the use of Clarence Lauten, confessed judgment on a written lease against the defendant, Nick Maheras, for the sum of \$1155.00, alleged to be due as rent under the lease. The lease was for the term beginning May 1, 1924, and ending April 30, 1929, and demised to the defendant the first floor of the plaintiff's building at 2150 West North Avenue, Chicago, Illinois. The judgment by confession includes an item for \$135 for fifteen days rent from May 1, 1929, to May 15, 1929, because of a hold over by the defendant, after the expiration of the lease in question. It may be stated at this point that the trial court was in error in entering a judgment under the lease for the fifteen days rent from May 1, 1929, to May 15, 1929, as this period of time was not included in the lease and, consequently, could not be made part of a judgment based on that instrument without other proof. Cohen v. Saxler, 221 Ill. App. 184; Leber v. Forera, 215 Ill. 370.

It appears from the record that upon motion of the defendant, accompanied by an affidavit setting up his grounds for defense, the judgment was opened and leave given to plead, the judgment to stand as security. The defendant filed his affidavit of merits July 8, 1929, which was stricken from the

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Journal of Interpersonal Violence 26(10)

Journal of Management Studies, 2006; 43(7): 989–1004

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Journal of Management Studies, 1986, 23(1), 7-10.

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files. An amended affidavit of merits was filed August 18, 1939, which was stricken from the files. A second amended affidavit of merits was filed August 31, 1939, which in turn was stricken from the files, and the judgment entered by confession May 30, 1939, ordered to stand as the judgment of the court. From this judgment defendant appealed to this court.

It is insisted on behalf of the defendant that the court erred in striking his second amended affidavit and ordering the judgment to stand.

It is urged by the plaintiff that the appeal is from the second affidavit of merits and not from the third, but an examination of the record shows that the appeal is from the second amended affidavit of merits which is, in fact, the third pleading of the defendant.

In effect the second amended affidavit of merits charged that the defendant had sustained damages to his property by reason of the negligent manner in which the plaintiff had managed the premises, other than those demise to the defendant, as a result of which, water pipes had been allowed to burst and defendant's property damaged. It also contained a charge to the effect that the parties had met and agreed upon the amount of the damages sustained by the defendant, and an agreement was entered into by which the plaintiff was to accept \$237.50, as the balance of the rent, after allowing the defendant the claim for his loss. This agreement as to the amount reached by the parties is called an account stated in the affidavit of merits, but it is apparent that it is an amount agreed upon, after allowing a recoupment to the defendant by reason of the tort of the plaintiff. A pleading depends upon the facts stated therein and not upon the terms used. The defendant had a right to set-off the claim for damages growing out of the negligence of the defendant, suffered during the term of the lease, where the liability grew out of the relationship of

1944, entered in which is the judgment of the court. From this
From the filed, and the judgment entered by the court on May 17,
of which was filed August 11, 1944, which is also the judgment
which was entered from the filed. A second judgment was entered
filed, an amended petition of which was filed August 16, 1944,

copy page forwarded to the Bureau on October 21, 1944.

It is noted by the plaintiff that the amount is from the second affidavit of service and was from the third, and as such is not a part of the record upon which the court was asked to make its decision. It is held, the court should have awarded attorney's fees which it is held, the court should have awarded attorney's fees.

On October 10, 1944, the following information was received from the Bureau of the Census, Washington, D. C., in answer to a letter from the Bureau of the Census, Washington, D. C., dated October 10, 1944, regarding the above-named individual:

[illegible]

landlord and tenant. Selig v. Stafford, 284 Ill. 610.

It is insisted that the defendant is attempting to shift his theory of the defense from an account stated to an action of recoupment. The affidavit of merits sufficiently apprized the plaintiff of the defense relied upon. While in the affidavit of merits reference is made to an account stated, nevertheless, from the facts stated therein, it is apparent that the defense, if any there is, would be one of recoupment.

The allegation that the part of the premises upon which the water pipes which burst were located, was under the control of the plaintiff, may be inartistically stated, but there is enough in the affidavit, coupled with the charge that the plaintiff recognized his liability by agreeing to compromise, to be sufficient in our opinion to amount to a charge that this particular part of the premises in question was under the control of the landlord. The defendant should have been given an opportunity to defend under his second amended affidavit of merits.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed and the cause is remanded for a new trial in accordance with the views expressed in this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED.

REYER AND HOLSON, JJ. CONCUR.

34039

SWARTS BROS., INC., a Corporation,

Defendant in Error,

v.

ABE BEHARF,

Plaintiff in Error.

NUMBER 73

SUPERIOR COURT,

COOK COUNTY.

257 LA. 847
Opinion filed May 28, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is a writ of error sued out by the defendant, Abe Beharf, to reverse a judgment for \$506, obtained by the plaintiff Swarts Bros., Inc.

The action was for trespass on the case and was originally against Abe Beharf and Jean Beharf. From the record it appears that suit was started March 14th, 1929 and both defendants served with summons. No pleas were filed. On May 15, 1929, on motion of plaintiff's attorney, Jean Beharf, one of the two defendants, was dismissed out of the proceeding and the cause submitted to the court without a jury for trial. The order further shows that the court heard the evidence, found the defendant guilty and assessed the plaintiff's damages at the sum of \$506. No default was entered against the defendant and there is nothing in the record showing that he was in court or agreed to the jury waiver or to the submission of the cause to the court for trial.

It is urged as a ground for reversal that, as there was no plea filed by the defendant and no order of default entered against him, there was no issue to be tried by the court

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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

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DEPARTMENT OF JUSTICE

Opinion filed May 28, 1930

THE UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

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and, consequently, the judgment is erroneous. Counsel cites Forrest v. Chasler, Opinion No. 32753, Appellate Court, First District of Illinois; Grabtree v. Gress, 36 Ill. 275; Leydig v. Patten, 158 Ill. App. 9.

The above cases lend full support to the position taken by the defendant. Judgment should not have been entered or the cause heard until it was at issue or a default taken.

We are not aided in our consideration of this proceeding by briefs on behalf of the plaintiff.

For the reasons stated in this opinion, the judgment of the Superior Court is reversed and the cause is remanded.

JUDGMENT REVERSED AND CAUSE
REMANDED.

RYHER AND HOLDOM, JJ. CONCUR.

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34056

E. F. O'DONNELL,
(Plaintiff) Appellee,

v.

THE EDWARD J. JOYCE FILING CO.,
a Corporation,
(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

257 I.A. 618

Opinion filed May 28, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

The plaintiff, E. F. O'Donnell, obtained a judgment by confession on a judgment note for the sum of \$576.17, against the defendant, The Edward J. Joyce Filing Co., a corporation. The judgment was opened on a petition filed by the defendant and leave given to appear and defend. The cause was heard by the court without a jury, resulting in a finding by the court in favor of the plaintiff and judgment against the defendant for the amount already stated.

From the facts it appears that the plaintiff had been in business for himself and had entered into a contract with the defendant, under which he conveyed his business to the defendant and, at the same time, was given a service contract for a period of five years. The defendant at the time gave to the plaintiff four notes, numbered one to four, respectively, in the amount of \$493.77 each and, at the same time, agreed to pay the plaintiff commissions for services rendered from that date on with a drawing account of \$100 on the first and fifteenth of each and every month. There was to be an accounting between the parties every third month as to the amount of commissions, if any, due. The first three notes were paid and this action is to recover on the last remaining note. This note was dated

U. S. DEPARTMENT OF JUSTICE

CRIMINAL DIVISION

RE

THE UNITED STATES OF AMERICA
vs.
JOHN EDGAR HOOVER

(Indictment)

957 I.A. 648

Opinion filed May 28, 1930

RE. HOOVER'S motion for a writ of habeas corpus.

At the report.

The plaintiff, J. E. HOOVER, complains & alleges by indictment on a judgment nisi for the sum of \$100.00, against the defendant, the United States of America, a corporation. The plaintiff was charged on a particular bill of the defendant and later given to arrest and return. The return was made by the sheriff without a jury, resulting in a finding in the favor of the plaintiff and judgment against the defendant for the amount already stated.

Now the Court is advised that the plaintiff has been in custody for himself and has retained into a contract with the defendant, which shall be completed his business in the following way: at the same time, and gives a written contract for a period of five years. The defendant at the same time to the plaintiff two years, amounting to \$100,000, and to the amount of \$100,000 each year, at the same time, to pay the plaintiff commission for services rendered for that time on with a growing amount of \$100 on the first and \$1000 on each and every year. There are to be no conditions, except the plaintiff every five years to be the amount of \$100,000. It may, that the first year, that will not be paid in as interest on the first year's salary. This will not be paid

August 15, 1928, payable one year after date. The defense appears to be based upon the theory that the note was paid and that when last seen, it was on the desk of Joyce, the owner of The Edward J. Joyce Filing Co.

Fazek, the manager of the Joyce Company, testified that on October 21, 1928, he had a conversation with the plaintiff at the office of the company, at which time plaintiff said he would like to borrow \$335.00. Plaintiff did not have the note with him at the time, but Fazek borrowed this amount from a man by the name of McCarthy, who appears to have had offices in the building and it was paid to the plaintiff by McCarthy's check and bore the plaintiff's endorsement. Fazek testified that again on November 21, 1928, plaintiff stated that he needed \$200.00 more and that he would turn in the note in question. This amount was given to him and the note was turned over to Fazek and he placed it on Joyce's desk. The witness testified further that he did not see the note again until it appeared at the bank on August 15, 1929, for payment.

Evidence was introduced showing plaintiff had access to the files of the company, evidently for the purpose of attempting to prove that it had been taken by the plaintiff, after the last payment. Plaintiff denied having the note at the office of the defendant, but testified that it had been all the time at his home, and had never left his possession. A significant fact in connection with the transaction is, of course, that there were no endorsements on the back of the note, showing either of the payments testified to by the witness Fazek, nor was the note marked canceled which would, ordinarily, have been done in the course of a business transaction after it has been paid.

On cross-examination Fazek testified that the plaintiff continued in their employ until July 1, 1929, which was some time after the alleged payments on the note. He further stated on

cross-examination, that they stopped paying the plaintiff under his service contract, July 1, 1928,

Plaintiff testified that he received various amounts on his commission contract and insisted on an accounting from the company in order to ascertain what amount was due him, which was refused. He testified further to the effect that the amounts received were not in payment of the note, but for moneys due him for services. This testimony on behalf of the plaintiff was in answer to testimony of the defendant's witnesses.

It is insisted on behalf of the defendant that the finding of the trial court is contrary to the manifest weight of the evidence.

In our opinion there appears to be in the record ample evidence to support the position of plaintiff, and we see no reason for disagreeing with the trial court in its finding as to the facts.

Objection is made to the ruling of the trial court, refusing the admission of the written contract between the parties in evidence. We see no error in this ruling. The action was based on a note, and the defense attempted to be set up was payment of certain amounts by the defendant to the plaintiff. It was upon cross-examination of the defendant's witnesses, and by their admissions, that it appeared there was another agreement between the parties independent of the note in question. It was a question for the court as to whether the payments made by the defendant, were upon the note, or as an advance or payment of commissions earned or to be earned by the plaintiff while in the employ of the defendant company.

We have examined the contract, however, which was offered in evidence and there appears to be nothing in conflict or different from the testimony of the witness Pasek. Defendant attempted to introduce in evidence a written report made by the

THESE CONSIDERATIONS, HOWEVER, DO NOT PRECLUDE THE POSSIBILITY THAT

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witness Dwyer, an auditor, to the entry of which report the plaintiff objected and the objection was sustained. It is urged that the court erred in this ruling.

From an examination of the record, it appears that the books were not in court nor offered in evidence, and there was nothing upon which to base the audit, its admission in evidence was properly denied, there being no foundation upon which it could be based. Moreover, there is nothing to show that the account was complicated. It was necessary to establish this fact in order to establish the premise on which such an audit would become admissible in evidence. Hochschild v. Goddard Tool Co., 233 Ill. App. 46/

The burden of proof was upon the defendant to show payment after the introduction of the note in evidence and after plaintiff rested. The court evidently was of the opinion that the defendant had not succeeded in overcoming the prima facie case made out by the introduction of the note in evidence. The cause having been tried by the court without a jury, the rule is, and it is presumed, that the court considered only such evidence as was material. We see no reason for disturbing the judgment.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

RYKER AND HOLDOM, JJ. CONCUR.

34086

EDGARD G. MELLANZA,

(Plaintiff) Appellee,

v.

JOSEPH ALLEGRETTI,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

257 I.A. 648²

Opinion filed May 28, 1930

MR. PRESIDING JUDYICK WILSON delivered the opinion of the court.

Plaintiff's claim is for money loaned or advanced and paid out at the special instance of the defendant. Defendant's affidavit of merits denied the claim or any part of the same. The trial resulted in a verdict by a jury, assessing plaintiff's damages at the sum of \$960. Judgment was entered on this verdict.

From the testimony it appears that the plaintiff was the uncle of the defendant, and the advances appear to have been made to the defendant about the time he was preparing to leave for California to become an intern in one of the hospitals in Los Angeles. The plaintiff was the owner of a drug store in Chicago. In his testimony, he stated positively that he loaned defendant the following sums of money:

- \$105.00 for his trip to California;
- 50.00 sent to him at California;
- 350.00 advanced for the purchase of a Willys-Knight automobile;
- 15.00 for membership in the Chicago Motor Club;
- 18.00 license fees;
- 50.00 insurance;
- 100.00 in cash in 1924, upon the return of the defendant;
- 100.00 for surgical instruments;
- 18.00 for his doctor's sign;
- 5.00 for having the fender fixed on defendant's car;
- 35.00 for room and board at Williams Bay, Wisconsin;
- 100.00 to pay his expenses home from California.

Plaintiff's testimony was supported in part by one Tufo, a lawyer, who testified that he had a conversation with the



Opinion filed May 29, 1930

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defendant and his parents with reference to plaintiff's claims, part of which were admitted as being owed by the defendant. Anne Davis testified that the defendant admitted owing money to his uncle, the plaintiff, for the trip to California and for payment for an automobile.

The defendant denied having received any money, whatever, from the plaintiff. His brother Orest F. Allegretti, testified that he, himself, bought the machine for cash and paid the insurance, license fee and other incidentals in connection with the purchase. From the facts, however, it appears that this brother, at the time of the alleged purchase, was 31 years old, and that the purchase price of the automobile with its accessories, was \$1835.00. He obtained his license as a registered pharmacist in 1923, the year of the alleged purchase, and received employment in his uncle's drug store.

It is insisted that the cause should be reversed because the verdict was against the manifest weight of the evidence. With this we are unable to agree. There was sufficient evidence on behalf of the plaintiff, which standing alone, was sufficient to support the verdict.

It is also urged as a ground for reversal, that the court erred in refusing to admit in evidence files of a prior case. It does not appear that this former trial was between the same parties, and moreover, the attempt to introduce the files was made during the cross-examination of plaintiff's witness. The proper time to have introduced these files in evidence would have been during the course of defendant's evidence. It does not appear that the offer was renewed during that period of the trial.

It is argued that the amount of the verdict does not conform to the proof. The proof, however, as it appears from the evidence of the plaintiff, shows that there was \$974.50, plus interest, due the plaintiff. Defendant should have no cause to complain of a lesser amount found due by the jury.

We see no reason for disturbing the judgment of the Municipal Court.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

It is noted that the amount of the various fees

and charges is included in the total amount of the bill, and that the same is included in the bill for the various items.

It is noted that the amount of the various fees and charges is included in the total amount of the bill, and that the same is included in the bill for the various items.

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33922

HYDE PARK INVESTMENT CO., a
Corporation,

Appellee,

v.

HYDE PARK STATE BANK, a
Corporation,

Defendant.

FRED M. HEINKEL,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

257-14-0483

Opinion filed May 28, 1930

MR. JUSTICE HOLSON delivered the opinion of the
court.

All the questions of law and fact involved in this
case have been considered and determined in Case No. 33747
on the appeal of Liberty Supply & Lumber Company. In
accordance with the decision in that opinion pronounced, the
decretal order of the Superior Court of Cook County, dis-
missing for want of equity the intervening petition of Fred
M. Heinkel is hereby affirmed.

AFFIRMED.

WILSON, P.J. AND RYNER, J. CONCUR.

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Opinion filed May 28, 1930

and the following are suggested minimum standards:

2. *Chlorophyll*

6000 ft level was first seen in 1927; 8000 ft

1977, pp. 1-2. It is suggested that the following text be added to the end of the report:

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103. *Staphylococcus aureus* (Staphylococcus aureus) is a Gram-positive, spherical bacterium that is commonly found on the skin and in the nose of humans and animals. It is a facultative anaerobe and can grow in a wide range of environments. It is a major cause of skin infections, such as abscesses and impetigo, and is also responsible for more serious infections, such as pneumonia and sepsis. It is resistant to many antibiotics and disinfectants, making it a difficult pathogen to treat.

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33923

HYDE PARK INVESTMENT CO., a
Corporation,

Appellee,

v.

HYDE PARK STATE BANK, a
Corporation,

Defendant.

GEORGE THOMAS,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

257 I.A. 643⁴

Opinion filed May 28, 1930

MR. JUSTICE HOLDEN delivered the opinion of the
court.

All the questions of law and fact involved in this
case have been considered and determined in Case No. 33747
on the appeal of Liberty Supply & Lumber Company. In
accordance with the decision in that opinion pronounced, the
decretal order of the Superior Court of Cook County, dismissing
for want of equity the intervening petition of George Thomas
is hereby affirmed.

AFFIRMED.

SILSON, F.J. AND RYKER J., CONCUR.

• 1990 • 2000 • 2010 • 2020 • 2030 • 2040 • 2050 • 2060 • 2070 • 2080 • 2090 • 2100

33924

HYDE PARK INVESTMENT CO., a
Corporation,

Appellee,

v.

HYDE PARK STATE BANK, a
Corporation,

Defendant.

—
ALFRED JONES,

Appellant.

12/7
APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

257 I.A. 648

Opinion filed May 28, 1930

MR. JUSTICE HOLBOM delivered the opinion of the
court.

All the questions of law and fact involved in this
case have been considered and determined in Case No. 33747
on the appeal of Liberty Supply & Lumber Company. In
accordance with the decision in that opinion pronounced, the
decretal order of the Superior Court of Cook County, dismissing
for want of equity the intervening petition of Alfred Jones
is hereby affirmed.

AFFIRMED.

WILSON, F.J. AND RYNER J., CONCUR.

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33935

HYDE PARK INVESTMENT CO.,
a Corporation,

Appellee,

v.

HYDE PARK STATE BANK, a
Corporation,

Defendant.

JAMES A. BLACK HARDWARE COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

257 I.A. 649

Opinion filed May 28, 1930

MR. JUSTICE HOLLAND delivered the opinion of the
court.

All the questions of law and fact involved in
this case have been considered and determined in Case No.
33747 on the appeal of Liberty Supply & Lumber Company. In
accordance with the decision in that opinion pronounced, the
decisional order of the Superior Court of Cook County, dis-
missing for want of equity the intervening petition of
James A. Black Hardware Co. is hereby affirmed.

AFFIRMED.

WILSON, F.J. AND RYKER, J. CONCUR.

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SURAH McCLANSON,
Defendant in Error,

vs.

The Estate of JOHN W. McNEILLAN,
Deceased,
Plaintiff in Error.

WRIT TO THE CIRCUIT COURT
OF COOK COUNTY.

2571A. 349²

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The judgment under review was for a claim of \$5,786.44 with interest, rendered in the Circuit court on a trial de novo on appeal from the Probate court allowing said claim. The claim is based on certain promissory notes assigned and endorsed to the plaintiff by her son, the payee. The notes were signed by the deceased and secured by an assignment and mortgage of one-half of his legacy and interest in his father's estate then in course of probate in Cook county.

Before the trial in the Circuit court defendant moved for leave to file pleas, a verified plea and an affidavit of merits, denying among other things the execution of the notes. The motions were disallowed, trial followed before a jury, and the court directed a verdict for plaintiff.

Plaintiff in error urges these several grounds for reversal: That the notes and collateral security were predicated on an usurious and illegal consideration; that they were not legally executed, delivered and signed, that there was a partial failure of consideration, that there was a conspiracy between the payee, his father and his mother, the plaintiff, "to circumvent the statute of usury;" that the trial court erred in denying the motions aforesaid, and in the admission of evidence and in directing a verdict.

While the court should have permitted the plea denying the execution of the notes to be filed under Section 59 of 18

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1. The following is a list of the names of the persons who have been identified as having been in contact with the subject of this investigation, and who have been identified as having been in contact with the subject of this investigation, and who have been identified as having been in contact with the subject of this investigation.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

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While the court would have provided the plan during the execution of the plan, it is not clear that the plan was provided to the court during the execution of the plan.

Practice Act (DeClerque v. Campbell, 231 Ill. 442), yet the defendant was not harmed by the ruling. Denial of execution throws the burden of proving it on the plaintiff and without such a plea defendant is not permitted to deny it. But in the case at bar plaintiff assumed and made proof of the execution and defendant was permitted without such denial to present the several defenses set forth in the rejected pleas. Plaintiff in error, therefore, is in no position to complain of the ruling. The claim was in writing, as required in Section 18, Ch. 3, Cahill's Stats., and except as to denying execution or pleading usury in defense no other formal writing was required either in the Probate court or on the trial de novo in the Circuit court.

The point made that the written claim failed to comply with Section 18 of the Practice Act is not alleging that the claimant was "the actual bona fide owner of the assigned instruments," is applicable only ^{to} nonnegotiable instruments. The claim here, as before stated, is based on negotiable instruments. The fact that it recited that the notes were secured by the assignment of the interest of the deceased in his father's estate, as aforesaid, did not change the character of the claim as one to recover on promissory notes.

Nor do we think there is reversible error in the other rulings complained of. They are predicated on undisputed facts established by the testimony of the McLassons when called as defendant's own witnesses.

John W. Donnellan, since deceased, executed three promissory notes to the order of Howard McLasson for amounts respectively as follows: \$4,000 on September 17, 1926, due ten months from date; \$1,500 on October 28, 1926, due July 17, 1927, and \$107 on January 25, 1927, due thirty days from date, each at

[illegible]

seven per cent interest from sale, and each secured by assignment of the interest of deceased in his father's estate. Each was endorsed by the payee and delivered to plaintiff before it became due, the first two in November, 1926, the last in January, 1927, for which and for other securities she paid \$9,440.67. There is nothing in the evidence having any legitimate tendency to show that prior to the transfer and delivery of said notes to plaintiff she had any knowledge of the transactions between her son Howard and said Donnellan or of what the consideration therefor consisted. On the contrary, when called as a witness for defendant she testified that before getting the notes she did not discuss those matters with either her son or her husband but took them on the statement of her son, who was in the business of loaning money, that they were "good and drew seven per cent interest."

The charge of conspiracy is based upon such suspicion as may be raised by these additional circumstances. The McGlassons lived together, and the father and son occupied the same office and together conducted the negotiations with Donnellan for the loans. The latter received on the first loan \$3,200 in cash, on the second, \$1,200, and on the third, \$100. The balance of \$400 on the first loan and the sum of \$200 on the second, were made up by orders on Howard by Donnellan to pay those sums to the father for services he had rendered in connection therewith. While the charge of usury and of "conspiracy to circumvent usury" might have some support from these circumstances as against the father and son, they were not admissible as evidence against the plaintiff in the absence of any proof, actual or constructive, of her knowledge thereof, which she as defendant's witness expressly denied.

The claim that she is not a holder in due course can not be established by the mere circumstance of such family relation-

even get into the car, and was covered by witnesses
in the interest of justice in his father's estate. Each was
indicated by the papers was delivered to plaintiff before it began
the, the first was in November, 1937, the last in January, 1937,
the which and the other occurred on July 17, 1937. There is
nothing in the evidence having any legal bearing to show that
either to the transfer and delivery of said notes to plaintiff the
and any knowledge of the transactions between her and Howard and
said transaction at a time the transaction had not occurred. In
the country, which called as a witness for defendant and testified
that before getting the notes she did not know these notes
with either her son or her husband but took them on the statement
of her son, who was in the business of raising money, that they
were "good and true notes and well interest."
The charge of conspiracy is based upon such evidence
as may be taken in these additional circumstances. The defendant
lives together, and the father and son occupied the same office
and together conducted the business with defendant for the
years. The father received on the first loan \$1,200 in cash, on
the second, \$1,500, and on the third, \$1,000. The balance of \$200
on the first loan and the sum of \$100 on the second, were made up
by orders on Howard by defendant to pay these sums to the father
for services he had rendered in connection therewith. While the
charge of conspiracy is circumstantial, it is not necessary to show
that defendant was directly involved in the conspiracy to obtain the
notes, but that she was not a witness against the plaintiff in
the absence of any proof, except on circumstantial evidence, of her knowledge
thereof, which she as defendant's witness expressly denied.
The claim that she is not a witness in the case can
not be sustained by the facts and circumstances of said family relation-

ship. Whatever inferences might be drawn therefrom were expressly refuted, as aforesaid, by the testimony of defendant's own witnesses. If the defect of usury might have been urged while the notes were in the hands of the payee there was no evidence tending to charge plaintiff with knowledge thereof or to show that she was not a holder in due course. There being no evidence that had any legitimate tendency to establish any of the defenses as against plaintiff, the verdict was properly directed.

Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

(continued from page 6)

and any business necessary to establish any of the defenses as was not a matter in the case. There being no evidence that any charge directly with the defendant or to show that notes were in the hands of the parties there was no evidence introduced. It was stated at early might have been urged while the witness, as observed, by the testimony of defendant's own wife.

maintained virtually the same level as previously.

Approved for Release by NSA on 08-25-2013 pursuant to E.O. 13526

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34054

LOLA KATE,
Appellee.

v.

AMERICAN LINEN SUPPLY
COMPANY, a corporation,
Appellant.

1247
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

257 I.A. 349³

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action of trespass on the case. The declaration contained three counts, the third of which was withdrawn at the trial. The first count charges malicious prosecution, and the second, false imprisonment. Defendant filed the plea of general issue. The jury found the defendant guilty and assessed plaintiff's damages at \$5,000. From the judgment entered thereon this appeal is taken.

Various errors are assigned, one of which is that the verdict is excessive. From a review of the evidence we think that assignment is well taken and that the size of the verdict cannot under the circumstances be accounted for otherwise than on the grounds of passion and prejudice.

At the time of the occurrences hereinafter stated plaintiff, a young married woman, was in the employ of defendant as a stenographer and typist and had been for several months previous. In the room where she and other young women were employed and defendant's office and credit manager had a desk was a safe in which was kept postage stamps and envelopes containing money, the amounts of which were noted on the outside

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AMERICAN ALIEN SERVICE
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

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853 I.A. 343

TO: DIRECTOR, FBI

FROM: SAC, NEW YORK

This is an outline of the report on the above. The
investigation contained three parts, the first of which was
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of the envelopes. The doors to the safe were kept open. In August, 1937, two envelopes containing money, one ten dollars and the other five, were missing from the safe. In the same month twenty-five dollars disappeared from the desk of one of the employees next to plaintiff's, and ten dollars from the desk of another employe. These matters being reported to Wallmuth, the officer manager, in the latter part of August he placed in the safe an envelope containing three marked one dollar bills and 65 cents, and noted on its face as the amount it contained \$3.65, intending and keeping it there as a decoy. There was another envelope in the safe containing \$7.40, so marked on it. Both envelopes were sealed. The latter envelope disappeared in the latter part of August and on September 9 the other envelope containing the \$3.65, marked as aforesaid, disappeared during the hour when the employees took their noon meals in the basement of the building, some going at one time and some at another. During the hour Wallmuth was notified by Ruth Carlson, one of the employees who had come back from her lunch to the office, that the envelope containing the \$3.65, which she saw in the safe before she left for lunch, had disappeared. Suspecting ^{plaintiff} Wallmuth handed Edna Gates, another employe, a two-dollar bill and asked her to go to plaintiff to have it changed. He and the two bookkeepers, Miss Belts and Miss Carlson, saw her go to plaintiff, saw the latter make the change, and immediately return to the manager with the two one dollar bills that she had received from plaintiff still kept in her hand after receiving them as she walked back and handed them to Wallmuth. On examination they were found to be two of the marked bills he had placed in the envelope. Within ten minutes thereafter he asked plaintiff to come into his office. He told her that money had been

taken and asked her what she knew about it. She denied any knowledge of it but admitted giving two one-dollar bills to Miss Gates in change for the two-dollar bill. After the conversation with plaintiff the manager sought his superior, leaving a Mr. Hall in the private office with plaintiff. On his return he had a further conversation with her, and about six o'clock, after he had got in communication with his absent superior, called the police, who arrived about a quarter to seven. He outlined the case to them. They took her to the police station and he followed in his car.

Only the two bookkeepers and the manager handled the money in the safe. Plaintiff was permitted to go there to get postage stamps. Plaintiff testified in rebuttal that the two one-dollar bills had been in her pocketbook since she received her pay on the previous Saturday. But it clearly appeared that the two bills given in change by plaintiff were two of the marked bills that had been placed in the envelope containing the \$3.85, that the envelope had remained in the safe with the marked bills therein from prior to the time plaintiff had received her pay as aforesaid, and that it was there when Miss Gaxton went to lunch and not there when she returned within the hour, and within about ten minutes thereafter these marked bills were taken by plaintiff from her pocket book to change a two-dollar bill as aforesaid.

The evidence of plaintiff's guilt is so convincing as to constitute a complete defense to the first count, furnishing, as it did, probable cause for prosecution, and there being no evidence reasonably tending to support the charge of malice.

While guilt is not a complete defense to the count for false imprisonment, yet, even if the evidence was sufficient to sustain that count, the verdict, under the circumstances, is so

excessive as to indicate that the same was actuated by passion or prejudice growing probably out of evidence tending to show, though denied in some respects, that she was subjected to something in the nature of a "third degree," kept locked up in a police station from Friday afternoon until Saturday night without a complaint or warrant for arrest and without an opportunity to communicate with her mother or her husband under direction, as claimed, of Wallmuth that she should not be backed or permitted to communicate with anyone at all, and that she was taken to the bureau of identification where her finger prints were taken and the usual measurements made. There was no proof of special damages that would account for the verdict, and the prosecution failed.

Particularly applicable to this case is the language of the court in Hamlin v. Martin, 56 Ill. 315:

"To hold that a person who causes another to be arrested, under the full and not unreasonable belief that he has committed a crime, is to be held liable to several thousand dollars damages if he fails to sustain the prosecution, when he has acted throughout in good faith, and with no malice, would be to establish a rule rendering it so perilous to prosecute, that the community would often think it better to submit quietly to crime than to undertake to punish the criminal."

If a defendant acts in good faith, on evidence, whether true or false, which is sufficient to create a reasonable belief that the accused is guilty of the offense, he will be protected from the charge of malicious prosecution. (Anderson v. Friend, 88 Ill. 135; Glenn v. Lawrence, 250 Ill. 581-587.)

Finding, as we do, that there is nothing in the evidence denoting that appellant was actuated by malicious, improper or sinister motives, we are clearly of the opinion that the verdict was against the weight of the evidence as to the first count. And even if there was sufficient evidence on which to base a verdict

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U. S. Attorney General, Washington, D. C.

It is the policy of the Department of the Interior to provide for the protection of the public health and safety of the people of the United States by the regulation of the use of the lands and waters of the United States. The Department of the Interior is responsible for the management of the public lands and waters of the United States. The Department of the Interior is also responsible for the management of the public lands and waters of the United States.

of guilty on the second count, which in view of the necessity of a reversal we will not discuss, the damages assessed, in view of the unquestioned proof of guilt and no attendant circumstances of special injury to plaintiff, are altogether out of proportion to any real injury as disclosed by the evidence that she suffered therefrom.

Appellant complains of the refusal of the court to give certain instructions, one of which was to the effect that if the plaintiff was in fact guilty of the crime charged at the time the arrest was made then no recovery could be had under the second count, and under another to the effect that if the jury believed from a preponderance of the evidence that plaintiff was guilty of the crime charged in the information filed against her, then the verdict must be for defendant. Appellee contends that the instructions were properly refused because of the absence of a plea of justification to the second count. In view of the necessity of a reversal we shall not discuss the point as such a plea if necessary would probably be allowed if asked for before another trial.

We think, however, the court improperly denied an instruction as to the effect of the possession of stolen property soon after the commission of the crime. Bearing upon the charge in the first count defendant was entitled to that instruction.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

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34965

HARKELL BROSLAW, minor, etc.,
Appellee.

v.

COLUMBIA ICE AND ICE CREAM
COMPANY, a corporation,
Appellant.

1257
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

257 I.A. 649

MR. CHIEF JUSTICE DAFNEY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered on a verdict for \$38,000 in an action brought for a minor by "his father and next friend" for damages resulting from the crushing and amputation of his left foot.

The declaration consists of three counts, the first based upon the charge of negligent driving by defendant of its automobile, the second upon wilfully and wantonly driving, and the third substantially the same as the first with more particularity of detail. Each count alleges that the boy's father, in whose name the suit is brought, and his mother have assigned, transferred and relinquished their right to recover for any moneys expended, incurred, and to be expended and laid out in the future for medical services, etc., for the plaintiff, and the right to recover for any wages and earnings during his minority.

It was the plaintiff's contention that he was sitting on the east curb of a street near the front of his father's house and that defendant's ice cream truck was driven close to the curb and ran over his foot, crushing the toes so that the foot was subsequently amputated at the ankle. It was defendant's contention that the plaintiff ran from the curb in an



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THE FOLLOWING IS A SUMMARY OF THE CASE.

THIS IS AN APPEAL FROM A JUDGMENT RENDERED IN A SUIT
IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF
COLUMBIA, IN A CASE WHEREIN THE PLAINTIFFS, THE UNITED STATES
OF AMERICA, AND THE DEFENDENTS, THE DISTRICT OF COLUMBIA,
WERE PARTIES.

THE PLAINTIFFS ALLEGED THAT THE DEFENDENTS, BY
THEIR ACTIONS, HAD VIOLATED THE ACTS OF CONGRESS,
AND HAD THEREBY INCURRED LIABILITY TO THE UNITED STATES.
THE DEFENDENTS DENIED THE ALLEGATIONS OF THE PLAINTIFFS,
AND CLAIMED THAT THEIR ACTIONS WERE JUSTIFIED BY THE
ACTS OF CONGRESS. THE JUDGE, IN HIS JUDGMENT, FOUND
IN FAVOR OF THE PLAINTIFFS, AND ORDERED THEM TO
RECOVER DAMAGES FROM THE DEFENDENTS. THE DEFENDENTS
APPEAL FROM THIS JUDGMENT, AND CLAIM THAT THE JUDGE
MISAPPLIED THE LAW, AND THAT THEIR ACTIONS WERE
JUSTIFIED BY THE ACTS OF CONGRESS. THE PLAINTIFFS
RESPOND TO THE DEFENDENTS' CLAIMS, AND CLAIM THAT
THE JUDGE CORRECTLY APPLIED THE LAW, AND THAT THE
DEFENDENTS' ACTIONS WERE NOT JUSTIFIED BY THE ACTS
OF CONGRESS.

IT WAS THE PLAINTIFFS' CONTENTION THAT THE DEFENDENTS
HAD VIOLATED THE ACTS OF CONGRESS, AND HAD THEREBY
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ACTS OF CONGRESS. THE PLAINTIFFS RESPOND TO THE
DEFENDENTS' CLAIMS, AND CLAIM THAT THE JUDGE
CORRECTLY APPLIED THE LAW, AND THAT THE DEFENDENTS'
ACTIONS WERE NOT JUSTIFIED BY THE ACTS OF CONGRESS.

attempt to get on the side of the truck, and that missing the step his foot was caught in the wheel, causing the injury.

While there is some conflict of evidence as to just how the accident occurred the verdict must have been in accordance with plaintiff's theory of the facts, and it is not argued here that the verdict was against the weight of the evidence. In any event, we think there was a clear preponderance of evidence in favor of plaintiff's theory.

The errors relied upon are (1) that the proof does not show any legal capacity in the plaintiff to bring this action so far as damages to his parents are concerned; (2) errors in giving instructions; (3) that the verdict and judgment are excessive and the result of improper instructions and sympathy on the part of the jury.

As to the first point, it has been held by the Supreme Court of this State that "the parent may relinquish his right to the earnings of his child, and that he has done so may be inferred from the conduct of the parent, (Am. & Eng. Ency. of Law, 3rd Ed. 1959) and the prosecution of a suit in the name of the child by the father as next friend, for the recovery of the earnings of a minor would be equivalent to a relinquishment on the part of the father of the authority to collect or claim such earnings in his own right." (Chicago Screw Co. v. Weiss, 283 Ill. 534.) The court there refers to the fact that in Scott v. White, 71 Ill. 287, it affirmed a judgment for the value of services of a minor before he had reached lawful age in a case where the father appeared as a witness in his behalf in support of his claim to his wages, and that the court held that it was to be implied that the father had emancipated the son, and that under such circumstances the action

to get on the side of the street, and that missing the
the fact was wanted in the street, making the injury.

While there is some question as to whether

the accident occurred the parties must have been in contact
with plaintiff's injury at the time, and it is not enough
that the parties were against the weight of the evidence.
In any event, no other issue was a direct consequence of the
case in favor of plaintiff's injury.

The court ruled upon the (1) that the parties were not

in any legal way in the plaintiff's injury at the time
the accident occurred in his presence and consent; (2) that in
the case of the parties and judgment was

made on the basis of the weight of the evidence and the
the fact of the injury.

As to the third point, it was held by the court
that this case was not a case of negligence on the part of
the defendant of his child, and that he was not to be held
responsible for the injury. (See 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

and there were in the fact that in 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000)

and there were in the fact that in 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000)

by the son would be a bar to any action of the father. In the latter case it appeared that the defendant made no objection to the introduction of evidence as to the ability of the minor to earn wages as an element of damages in the case; and in the case at bar the proof of damages made was by agreement, without objection to its relevancy, that bills in the total sum of \$281 had been paid by the father to the hospital and nurses in addition to the doctor's bills, on which proof showed \$91 had been paid, and that a fair and usual charge for their services was \$400.

There was no other direct proof that would support a claim by the father, and no instruction bearing directly on this subject was requested by plaintiff. Instructions, however, were given at defendant's request which expressly recognized that the cause of action included any claim the father might assert for damages resulting to him as a proximate cause of the injuries. Defendant's said instructions purported to inform the jury on the points necessary to be proven by appellee in order to establish liability on the part of appellant for such damages as the parents might recover. One instruction told the jury that the plaintiff is claiming the right to recover all the moneys expended by the father and also for expenses to be made, incurred, and to be expended and laid out in the future for medical services, hospital services, surgical and medical treatment and medicine for the minor, and for wages and earnings of the minor during his minority, and then told the jury that before recovery could be had for such damages what degree of care must be exercised by the father, etc. Another told the jury that before plaintiff could recover for hospital, medical, surgical and other expenses incurred or to be expended and for loss of wages, if any, he must prove by a preponderance of evidence that the parents exercised due care and caution to prevent injury to him. Another states the law

requiring the parents to show that they exercised ordinary care for the safety of the child before recovery could be had for moneys expended on account of his injuries.

It will thus be seen defendant recognized as included in the cause of action the damages resulting from the injury for which the father might have a right of action.

Neither the sufficiency of the declaration in this respect was in any way brought in question, nor the right to introduce proof in support of the parents' claim as aforesaid.

Appellant urges that there was no proof of the relinquishment of such claim. But direct proof of the relinquishment is not necessary if it may be inferred from circumstances proven from which an intention on the part of the parent to relinquish his right fairly appeared. (Bank Bros. Coal Co. v. Kotsloff, 229 Ill. 194, 197.) In American Car Co. v. Hill, 236 Ill. 287, 286, the court held that the father by permitting a suit for the son to be brought and prosecuted in his name as next friend, and by procuring an instruction for the recovery of damages for loss of time and inability to labor during the child's minority, estopped the father from thereafter recovering such damages. To the same effect are authorities in other jurisdictions. (Emery v. Brainard & Armstrong Co., 88 Conn. 265; Judd v. Ballard, 88 Vt. 673; 30 Atl. 96; Abelen v. Bramfield, 19 Kas. 91.) The theory of the law is that it is the father's "privilege" to claim compensation for damages he thus sustains, but that he may waive or relinquish it to the minor. In this respect it is not a case of assignment of a cause of action or a chose in action such as is contemplated in section 18 of the Practice Act, Ch. 110, Chill's Stats., as argued by appellant. It is a right that comes from relinquishment or treating the child as emancipated for such purpose. As said in

There appears to be no connection between the two cases. The first case is a case of a person who has been in the United States for a long time and has been in the United States for a long time. The second case is a case of a person who has been in the United States for a long time and has been in the United States for a long time.

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the fact that the only way to do so is to do so in a way

It is not necessary to do any further work on this matter.

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DATE 08-11-2010 BY 60322 UCBAW/SJS

There are many other things that I have learned from this experience. I have learned that I am not alone in my struggles and that there are many people out there who are also struggling. I have learned that I am not alone in my struggles and that there are many people out there who are also struggling. I have learned that I am not alone in my struggles and that there are many people out there who are also struggling.

[illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation. Finally, the last step in the process is to evaluate the results of the implementation. This involves determining whether the problem has been solved and whether the resources have been used effectively.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

the Kenure case, supra:

"Where a parent thus, as next friend of his minor child, sues and recovers, in her name, damages to which the child, unless emancipated, is not entitled and the parent is entitled, he estops himself from thereafter, in an action in his own name, recovering for the same damages. He thus treats the child as emancipated, at least so far as the recovery for such injuries is concerned, and cannot thereafter be permitted to claim that he and not the child was entitled to recover for such items," citing authorities.

In the Judd case, supra, it was held that recovery for services relinquished by the parent may be had in the name of the minor, and in an action of tort, and that in such a case the damages claimed in connection with other damages resulting from the same injury are recoverable only by the minor.

The contention, therefore, by appellant under its first point to the effect that the action must conform to the requirements of said section 18 of the Practice Act, is untenable, and, we might also add without discussion, that it was not raised at the trial and is not raised by a motion in arrest of judgment.

As to the instructions claimed to be erroneous. It is urged that plaintiff's twelfth instruction, relating to damages, directs the jury to assess the amount of "actual damages" which the plaintiff has sustained without limiting such damages to fair compensation. Not only did defendant also employ the same phrase in one of his instructions, but the instruction in question does limit the amount the jury may find to "a just and fair compensation for the said injuries," etc.

Two instructions, the third and tenth, given at plaintiff's request, state an abstract principle not questioned as to the right of children to use a public street. The criticism is that they assume that the child had the right to be on the street when the truck was there "at the same time and in the same place," thus ignoring defendant's evidence that the boy was attempting to jump onto the track at the time of the accident. Taking the

instructions as a series and in connection with other instructions given at defendant's request to the effect that there could be no verdict against defendant at all if the child ran to or jumped onto the truck after its front wheels had passed him, - as was defendant's theory of the facts - we do not think the jury could reasonably give said instructions the construction contended for.

Plaintiff's fifth instruction states that one of the modes of impeaching a witness is by showing that he has made statements or given testimony before the trial at variance with his statements on the witness stand. It is contended that by omitting the adjective "material" before the word "statement" an essential element is left out of the instruction. The instruction is in this form has been approved in many cases. (Raymond v. The People, 226 Ill. 435, 436; Egan v. Moellenbrock, 322 Ill. 426, 433.) In Graig v. Bohrer, 63 Ill. 325, it was held that the credibility of a witness may be affected by contradictory testimony without showing his statements are material to the issue.

Complaint is also made of plaintiff's fourth and sixth instructions which likewise state principles of law as approved by many cases of the Supreme Court, the former to the effect that negligence of the parents in permitting the child to go upon the street cannot be imputed to or charged against him, and the latter to the effect that the child being between four and five years of age could not be charged with carelessness or negligence contributing to the happening of the accident. When read in connection with defendant's instructions on the same point they were not misleading to the jury.

The eighth instruction, given at plaintiff's request, reads as follows:

"The court instructs the jury that the plaintiff is not bound to prove his case beyond a reasonable doubt, but he is required only to prove it by a preponderance of the evidence."

The objection to the instruction is based upon the ruling of the Supreme Court in Molloy v. Chicago Rapid Transit Co., 335 Ill. 164, 171, holding that part of an instruction on the burden of proof, reading "it is for her (plaintiff) to prove her case by a preponderance of the evidence," to be error because "it refers to the evidence bearing on plaintiff's case without any statement as to what the case is or what it is necessary for her to prove, but it refers the whole case to the jury without any limitations." The court stated that it opened the door for the jury to take any views of plaintiff's case which they saw fit to take and to arrive at a verdict for any reason which might seem to them to be sufficient, without any rule to guide them, and that an instruction must limit the right to recover to negligence charged in the declaration. The objection to the reference to "his case" was regarded in Chicago City Railway Co. v. Nelson, 215 Ill. 443, as not of substantial merit, and a like instruction was approved in Pearson v. Lyon & Healy Co., 243 Ill. 370, and cases there cited. While it is difficult to reconcile the Molloy decision on this point with the opinions in those cases, it is our opinion that there was no intention in the Molloy case to overrule said prior decisions on this subject and to hold that the instruction in that form constituted reversible error, especially as there was no reference to or discussion of those cases.

As to appellant's third ground for reversal that both the verdict and judgment are excessive, we think the contention is well founded. It is one of the grounds recited in the written motion for a new trial and made in the oral argument therefor. With appellee's contention that the question was not saved for review, although preserved in the written motion for a new trial, because it was alluded to only "in a perfunctory manner" in the oral argument, we do not concur. The gist of the argument was

that with respect to the size of the verdict it was unprecedented in such a case. Counsel for appellant has cited many cases wherein there were larger verdicts in this and other jurisdictions in personal injury cases. It would subserve no good purpose to discuss their varying features if, as a matter of fact, we think from an examination of them and similar cases, the judgment is too large. The same line of reasoning on which appellant's counsel seeks to sustain the judgment for that amount could be equally applicable to a judgment for \$40,000 or \$50,000. But we do not think the theory of the law of damages justifies a judgment of such size under the facts of this case. That the judgment is an exceedingly large one for the injuries sustained, compared with the general average amount of judgments in this class of cases for like injuries, must be conceded. It is true that the boy endured much pain and underwent several surgical operations consequent upon infection and the fact that the skin did not heal on a portion of the stump, and that he is still left with a painful stump on which he cannot bear any weight or stand pressure. The evidence tends to show that another operation or amputation will be necessary and that it is being deferred because of the result it might have in impairing his growth. A condition of nervousness, irritability, loss of flesh and various atrophies are also disclosed by the evidence. We fully recognize the seriousness of all these conditions and the difficulty in drawing a line as to where a judgment in such a case may be deemed excessive. There is no fixed standard for compensation in such cases. That the boy must go through life with a physical handicap that will be a great impediment, and in many cases an obstruction, to physical efforts cannot be questioned. However, that one's success in life is not necessarily otherwise seriously limited by the use of an artificial limb is well known.

The first question is the one of the validity of the contract. It is a contract of sale of goods, and the goods are specific. The contract is valid and enforceable. The second question is the one of the measure of damages. The measure of damages is the market value of the goods at the time of the breach. The third question is the one of the place of payment. The place of payment is the place of the contract. The fourth question is the one of the time of payment. The time of payment is the time of the contract. The fifth question is the one of the interest. The interest is the interest on the money. The sixth question is the one of the costs. The costs are the costs of the contract. The seventh question is the one of the expenses. The expenses are the expenses of the contract. The eighth question is the one of the profits. The profits are the profits of the contract. The ninth question is the one of the losses. The losses are the losses of the contract. The tenth question is the one of the damages. The damages are the damages of the contract.

and it was testified to that one could be used in the instant case without pain resulting from its use.

Without discussing the matter further it is the unanimous opinion of the court that the judgment is excessive and that it can be affirmed only in case of a remittitur of at least \$10,000. We find nothing in the record to indicate that its excessiveness can be accounted for by passion and prejudice of the jury.

If there is a remittitur within ten days the judgment will be affirmed for \$25,000, otherwise the judgment will be reversed and the cause remanded.

REVERSED BY REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

Seawles and Gridley, JJ., concur.

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34889

EDWARD C. WOODBELL,
Appellee,

v.

CONGREGATION BETH JACOB-
B'NAI BEZALEL ANSHE MERRACH,
a corporation,
Appellant.

1267
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.
257 I.A. 650

MR. PRESIDING JUSTICE BAIGENS
DELIVERED THE OPINION OF THE COURT.

This suit was begun against Congregation Beth Jacob, a religious corporation, to recover an alleged agreed commission of five per cent on \$55,000, the price at which its temple was sold through plaintiff as alleged in the statement of claim.

Later appellant was made a party defendant and Congregation Beth Jacob was subsequently dismissed out of the case.

Issues were taken on the second amended statement of claim which alleged an agreement for such commission, as aforesaid, and that after sale of the property Congregation Beth Jacob was consolidated with Congregation B'nei Bezalel into a corporation embracing the names of both, "by reason whereof" the new corporation assumed the liabilities of Congregation Beth Jacob, and that still later the new corporation became consolidated with a third congregation under the name of appellant, and "defendant thereby assumed the liabilities" of the first two named corporations.

The case was tried without a jury and from a finding and judgment against appellant for \$2,750 the appeal was taken.

The grounds urged and argued for reversal are that the finding was against the weight of the evidence and that the court erred in rulings thereon.

While there were irregularities in the hearing we are impressed by the evidence that plaintiff was entitled to his commissions under an agreement had with Congregation Beth Jacob. But as there was no proof whatever of the allegation that appellant assumed its liabilities, and that allegation was expressly denied by appellant's affidavit of merits, we are compelled to reverse the judgment. In their zeal over other issues the attorneys for both parties seem to have lost sight of this issue both at the trial and on this appeal.

We think the case should be retried.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

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36125

IRVING I. COHEN, for use of
BARNEY B. LIBMAN,
Appellee.

v.

BAKE WITH BAKERY, Inc.,
a corporation,
Appellant.

1297
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

257-11-050 2

MR. PRESIDING JUSTICE BARKER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against appellant as garnishee for \$663.50, being the amount of a judgment against plaintiff Cohen in favor of the uses herein, Barney B. Libman, on which an execution was returned "So Part Satisfied."

The garnishee answered "no funds," and in answer to interrogatories stated that it was incorporated February 21, 1928, and took over the business of a copartnership by the same name; that Cohen is an officer of the corporation but receives no salary as such; that he owns forty-five shares of its stock having a par value of \$100; that the corporation has declared no dividends; that upon the transfer of the business the corporation assumed the debts of the copartnership, and that said Libman was not a creditor of the copartnership at the time of the incorporation, and admits that no affidavit under the Bulk Sales Act was executed. The evidence heard sustains these allegations.

The only controveray of fact was whether the indebtedness on which Libman obtained judgment against plaintiff Cohen existed at the time of the transfer of the co-partnership property to appellant.

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The theory on which the garnishee was held liable is because of its noncompliance with the Bulk Sales Act. The purpose of that act is to protect creditors of the vendor. (Mosaki v. Smith, 224 Ill. App. 306.) But there is no contention here that Libman was a creditor of the copartnership. Nor was there any indebtedness of the corporation to Cohen.

If it be assumed that the interest of Cohen as a copartner can be reached under this garnishment the same as an execution subject to the rights of partnership creditors and to the rights of other partners it could only be as to his interest in the surplus after the partnership debts were paid and the accounts between the partners adjusted (Swan v. Gilbert, 175 Ill. 304, and authorities cited; Chandler v. Lincoln, 32 Ill. 74; Wainey v. Wainey, 54 Ill. 29) and there is nothing in this record to show either the value of the assets of the copartnership so transferred, or the amount of its debts, or whether Cohen's interest in the copartnership after payment of all of its liabilities would amount to the sum for which the judgment was entered against the garnishee. The proof, therefore, being in any event insufficient to sustain the judgment, it will be reversed.

REVERSED.

Scanlan and Gridley, JJ., concur.

34174

CHARLES M. WING,
Appellee,

v.

DALE D. SHEETS CO.,
a corporation,
Appellant.

1287
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

257 14.050²

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from the confirmation of a judgment entered by confession on two notes for \$350 each, dated November 20, 1928, and payable to the order of plaintiff two months and ten days after date, with interest at six per cent per annum after December 15, 1928. The cognovit admitted the sum claimed to be due, and judgment was entered April 11, 1929, for \$763.62 and costs, including reasonable attorneys' fees, against appellant alone who was made the sole defendant.

On the same date (April 11, 1929) another judgment by confession was entered on two like notes in amount and form, signed by the same parties under date October 15, 1928, one payable in three months and the other fifteen days after date, to plaintiff's order, for the amount admitted in the cognovit to be due, including reasonable attorneys' fees, and against appellant alone, as in the other case. In the cognovit in each case the attorney appeared for and confessed judgment against appellant alone.

On appellant's motion to vacate said judgments, supported by the affidavit of its president, Dale D. Sheets, both judgments were opened up and leave was given to make defenses, the judgment to stand as security.

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U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

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There is no record from the Commission of a statement

made by the Commission on any matter for 1950 except, dated February

10, 1951, and reports to the House of Representatives dated May

1951 after date, with reference to the fact that the

first meeting of the Commission was held on May 1, 1951, at

the fact that the Commission was organized on May 1, 1951, and

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By agreement both cases were heard together before the court without a jury, and they have been consolidated for hearing on this appeal.

In the first case the judgment was confirmed for the same amount confessed as aforesaid, and in the latter case (No. 34175 in this court) the amount was reduced and the judgment confirmed for the sum to which it was reduced.

It is urged that neither judgment was authorized and is void. The power of attorney under which they were entered provided as follows:

"We hereby authorize irrevocably any attorney of any court of record to appear for us in such court * * * to confess a judgment * * * hereby notifying and confirming all that our said attorney may do by virtue hereof."

It is settled law that "the power to confess a judgment must be clearly given and strictly pursued, and a departure from the authority conferred will render the confession void." (Keen v. Pump, 286 Ill. 11, and cases there cited.) In that case the warrant of attorney was joint, as here, being executed by a partnership and two individuals. The purported confession was by the two individuals and did not include the partnership, and the judgment was entered against the two individuals only. It was held that the warrant of attorney being joint it did not authorize a several judgment but must be executed by joint confession against all the signers of the note, citing Mayer v. Pick, 192 Ill. 361, where both English and American authorities on this subject to that effect are reviewed, holding in effect that where a judgment is not confessed by authority it will be void for want of power to confess it. It is there said that the great preponderance of authority, English and American, is opposed to the proposition

by agreement both cases were heard together before the court without a jury, and they have been consolidated for hearing on this appeal.

In the first case the judgment was affirmed for the same reasons mentioned in the second, and in the latter case (No. 11715 in this report) the reasons are stated and the judgment affirmed for the same reasons.

It is argued that neither judgment was authorized and is void. The power of attorney under which they were entered

is hereby authorized to execute any and all power of attorney to be executed by him in and about the premises and to execute a judgment in the premises and to execute any other act which may be required by him in the premises.

It is argued that the power to execute a judgment was not clearly given and is void, and a separate issue

is raised as to the validity of the judgment. In that case the court of appeals was divided, as were the judges of the court of appeals and the judges of the court of appeals.

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that a judgment may be confessed against one or two or more persons by virtue of a joint warrant of attorney authorizing, in terms, a judgment only against all executing the warrant.

In view of the settled law on that subject the judgments so confessed and confirmed, as aforesaid, must be deemed void and will be reversed.

The contention that this point was not made in the court below and, therefore, cannot be made here is untenable in view of the fact that a motion in arrest of judgment was denied in each case. The error is one on the face of the record reached by such motion. (Sincheimer v. Kinner Mfg. Co., 168 Ill. 116, 121, and authorities cited.)

Reaching this conclusion, other grounds for reversal need not be considered.

REVERSED.

Scanlan and Gridley, JJ., concur.

34175

CHARLES R. SMITH,
Appellee.

v.

DALE D. SMITH CO.,
a corporation,
Appellant.

1297
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARBER
DELIVERED THE OPINION OF THE COURT.

This is an appeal that has been consolidated for hearing with case No. 34174, having the same title, in which we have this day filed an opinion reversing the judgment. The material facts in the two cases are identical. In each a judgment by confession upon two promissory notes, under a joint power of attorney contained in the notes, was entered against only one of the parties signing the instruments. For that reason we there held it was void. What was said in that case is applicable to this and the same conclusion must follow.

REVERSED.

Scanlan and Gridley, JJ., concur.

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PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

VIRGINIA KAHNICK,
Plaintiff in Error.

BRANCH TO MUNICIPAL COURT
OF CHICAGO.

257 I.A. 651

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

An information was filed in the municipal court alleging that on November 16, 1939, in Chicago, Virginia Kahnick "unlawfully, wilfully and knowingly did possess a certain quantity of intoxicating liquor (amount not stated) for intoxicating beverage purposes, which then and there contained more than one-half of one per centum of alcohol by volume, and which was then and there fit for beverage purposes," contrary to the statute, etc. Defendant pleaded not guilty and waived a jury trial. After a hearing the court, on November 27, 1939, found her guilty as charged, and adjudged her guilty "of having in her possession certain intoxicating liquor containing more than one-half of one per cent. of alcohol by volume," and assessed a fine against her of \$500. By this writ of error she seeks to reverse the judgment.

Defendant's sole contention in this court is that the information is insufficient to sustain the judgment in that it does not state an offense against the Illinois Prohibition Act, in force July 1, 1931. We are of the opinion that the contention is meritorious. It is provided in section 3 of said Act (Cahill's Stat. 1929, Chap. 43, p. 1124) as follows:

"No person shall on or after the date when this Act goes into effect, manufacture, sell * * or possess any intoxicating liquor except as authorized in this Act. * *. Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold * * and possessed, but only as herein provided, and the Attorney General may, upon application, issue permits therefor, * *".

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It will be noticed that the information does not appropriately allege that defendant, in the possession of the liquor, was not within the exceptions mentioned in the statute. In Sokol v. People, 312 Ill. 238, 245, it is said: "It is the rule that where an act is made criminal, with exceptions embraced in the enacting clause creating the offense so as to be descriptive of it, the People must allege and prove that the defendant is not within the exceptions, so as to show that the precise crime has been committed. Where the exception is descriptive of the offense it must be negatived in order to charge the defendant with the offense, * * *." This rule has several times been applied by our Supreme Court in prosecutions under said Prohibition Act. In People v. Barnes, 314 Ill. 140, 143, after referring to said section 3 and also section 25 of the Act, it is said: "To manufacture, ~~possess~~, * * or furnish intoxicating liquor will, if unauthorized, offend against section 3, but if authorized by the act provides these acts will not violate that section. The possession of liquor, to constitute an offense under section 25, must be with the intent to use it in violation of the Act. Such an intent is a necessary element of the offense defined by section 25. The various acts specified in section 3 may be lawful or unlawful, hence a definite charge cannot be made under the act without an allegation that the accused person is not within the exceptions contained in the statute." (See, also, People v. Tain, 316 Ill. 83, 87; People v. Lewis, 318 Id. 184, 187; People v. Talbot, 322 Id. 416, 419-20.)

The exceptions mentioned in section 3 of the Act are "liquor for non-beverage purposes and wine for sacramental purposes." And the State's Attorney here contends that, inasmuch as the allegation in the information is possession of intoxicating liquor for beverage purposes, "the allegation, at least inferentially,

negatives both exceptions," and, hence, the information is sufficient. The contention cannot be sustained under authorities in this State. In Gunning v. People, 130 Ill. 168, 171, it is said: "It is not permissible, in pleading, to leave a fact necessary to be averred to be derived by inference from an allegation of a mere conclusion of law. All necessary facts should be pleaded with reasonable certainty, * *". In Wilkinson v. People, 326 Ill. 135, 140-1, in discussing a motion to quash an indictment, it is said: "The most that can be said in support of the sufficiency of the indictment is, that enough can be gathered from the whole indictment to sustain the conviction. In an indictment that is not sufficient, as it might be in a bill in chancery or a declaration. In criminal pleading the highest degree of certainty is always required." (See, also, People v. Herman, 316 id. 947, 951/. And the sufficiency of an indictment or information may be attacked on writ of error. (Kawanaki v. People, 218 Ill. 481, 484; People v. Minto, 318 id. 293, 295).

For the reasons indicated the judgment of the municipal court must be reversed.

REVERSED.

Barnes, P. J., and Scanlan, J., concur.

34048

In re ESTATE OF VERNON B.
GLICK, Deceased.

MARY MAC DONAGH, Administratrix
of Estate of Frank L. Mac Donagh,
Deceased,

Claimant and Appellee,

vs.

FOREMAN TRUST & SAVINGS BANK,
Administrator of Estate of
said Glick, Deceased,
Defendant and Appellant.

13 17
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

25774.051

33. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

On June 3, 1927, during his lifetime, Frank L. MacDonagh filed a claim in the probate court of Cook county against the estate of Vernon B. Glick, deceased. He claimed that prior to November 1, 1922, he had advanced to Glick, during the latter's lifetime, monies in the amount of \$762.80, and that he was entitled to recover the amount, together with legal interest, from Glick's estate. Subsequently MacDonagh died and the administratrix of his estate was substituted as the claimant. On February 14, 1929, after a hearing, the probate court allowed the claim for \$1,000.75, and thereafter the Foreman Trust & Savings Bank, as administrator, perfected an appeal to the circuit court. In December, 1929, there was a trial de novo in that court before a jury, resulting in a verdict for the claimant for \$1,032.80, and judgment in that sum was entered against the bank as administrator. The present appeal followed.

On the trial it appeared from the testimony of claimant's witness, Martin E. Clark, that in the year 1922 Glick and MacDonagh were bond salesmen and friends; and that on two written instruments introduced in evidence as claimant's exhibits 1 and 2,

The above information was obtained from the records of the Department of the Interior, Bureau of Land Management, at Washington, D.C., on January 14, 1964.

Very truly yours,
[Signature]

On the 10th of April 1941, the following was received from the Ministry of Health:

there were the genuine signatures of said Click. Exhibit 1 is pasted on or attached to the bottom of exhibit 2 below the signature on the latter. Exhibit 1 is on a printed form, headed "J. F. Townsend & Co., Stocks and Bonds, Chicago," is dated July 22, 1922, and is signed by Townsend & Co., above whose signature is the following, viz: "Received of Vernon F. Click Five hundred (\$500) Arkansas Valley Railway Certificate." Immediately below the signature of Townsend & Co. are the words: "Which bond I have borrowed from Frank L. MacDonagh"; and below said words is the signature "Vernon F. Click." Exhibit 2 is a letter dated October 23, 1922, addressed to said MacDonagh, and signed by Click, as follows: "On the 1st day of November in the year 1922, I shall be indebted in cash to you for the sum of \$762.50,--this sum to be subject to payment at any time depending upon your pleasure, plus interest, as agreed between us." No satisfactory testimony was introduced by defendant showing that the indebtedness of Click to MacDonagh, so admitted by the letter of October 23, 1922, had been paid. Defendant called only one witness, Joseph Savalson, a cousin of Click. He testified to the effect that Click was killed about Thanksgiving day, 1926; that "sometime in the fall of 1925" he asked MacDonagh if Click has borrowed any money from him (MacDonagh); and that the latter replied: "He does not owe me any." On the other hand Clark testified that "along about the fall of 1925" he tried to borrow some money from Click without success; that Click then said that he was low in funds and "owed MacDonagh some money" "about \$600 or \$700."

Defendant's counsel contends that the court erred in admitting in evidence claimant's exhibits 1 and 2. We do not think so. Exhibit 2 was clearly admissible. And there was no reversible error in admitting the attached exhibit 1, which apparently discloses how the major portion of the indebtedness, admitted by

There were the greatest agreement at this time, Exhibit 1 is

testimony in my affidavit to the effect that Exhibit 1 is the same as the letter. Exhibit 1 is on a separate page, marked "A."

Exhibit 1 is a letter from the "A" group, dated 1941, and is signed by the "A" group, dated 1941, and is signed by the "A" group, dated 1941.

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said exhibit W, arose. And we think that the verdict and judgment are sufficiently sustained by the evidence. The amount of the verdict includes interest on the \$762.30, at the legal rate, from November 1, 1922, to December 1, 1929, a period of seven years and one month.

Complaint is also made of certain remarks of claimant's attorney during the trial. On one occasion he referred to the claimant as the "widow" of MacDonagh and on another he mentioned that the case had previously been tried in the probate court. Objections to the remarks were sustained by the court. We do not think that, because of the remarks, the judgment should be reversed, as urged by defendant's counsel.

The judgment of the circuit court is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

will contain 2 pages, and the first page will contain the following:

The following is included by the witness. The amount of the

investments included in the 1932-33, at the same time, from

October 1, 1932, to December 1, 1932, in order to show that

the same amount.

Expenditures it also will be certain to include of amounts of

Expenditures during the trial. In one occasion he referred to the

amount as the "ratio" of expenditure and as another as expenditure

that the same had previously been used in the same manner.

Expenditures in the month of expenditure by the witness. He also

from that, because of the witness, the witness should be referred.

as well as expenditure's amount.

The balance of the trial is given in witness.

Witness.

Witness, J. A. and witness, J. A. witness.

34057

CONTINENTAL NATIONAL BANK &
TRUST CO., as conservator of
Joseph L. Spilky, incompetent,
Appellee,

v.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,
Appellant.

APPEAL FROM DECISION
COURT, COOK COUNTY.

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

Is an action in assumpsit, commenced February 15, 1922, and based upon defendant's insurance policy, there was a trial without a jury upon stipulated facts in December, 1929, resulting in a finding and judgment against defendant for \$909.60. The present appeal followed.

The policy was issued to the insured, Joseph L. Spilky, and while it was in force he became insane and his father, Isaac Spilky, was appointed conservator. The original plaintiff in the action was said Isaac Spilky as conservator, but on October 25, 1929, by agreement and order of court, the Continental National Bank & Trust Co., conservator, was substituted as plaintiff. Some of the provisions of the policy are as follows:

"New York Life Insurance Company agrees to pay to Isaac and Polly Spilky, parents of the insured, share and share alike, Beneficiaries, two thousand dollars (the face of this policy) upon receipt of due proof of the death of Joseph L. Spilky, the insured; * *

and the company agree to pay to the insured one-tenth (\$200) of the face of this policy per annum, during the lifetime of the insured, if the insured becomes wholly and permanently disabled before age 60, subject to all the terms and conditions contained in Section 1 hereof.

This contract is made in consideration of the payment in advance of the sum of \$73.32, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy to June 22, 1919, and of a like sum on said date and every twelve calendar months thereafter during the life of the insured until premiums for twenty full years in all shall have been paid from the date on which this Policy takes effect.

This policy takes effect as of June 22, 1918, which

[Handwritten signatures and stamps, including "RECEIVED" and "FEB 14 1918"]

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 FEB 14 1918
 [Illegible text]

[Illegible text]

In the letter to the Secretary, dated February 12, 1918, and based upon the Secretary's investigation, it was stated that a copy of the original letter to the Secretary, dated February 12, 1918, and the original letter to the Secretary, dated February 12, 1918, were being retained by the Secretary.

The policy was based on the Secretary's letter to the Secretary, dated February 12, 1918, and the original letter to the Secretary, dated February 12, 1918, and the original letter to the Secretary, dated February 12, 1918, were being retained by the Secretary.

The Secretary's letter to the Secretary, dated February 12, 1918, and the original letter to the Secretary, dated February 12, 1918, and the original letter to the Secretary, dated February 12, 1918, were being retained by the Secretary.

day is the anniversary of the Policy. If the Insured becomes wholly and permanently disabled before age 60 the payment of premiums will be waived under the terms and conditions contained in Section 1.

SECTION 1. TOTAL AND PERMANENT DISABILITY BENEFITS.

Whenever the Company receives due proof, before default in the payment of premiums, that the Insured, before the anniversary of the Policy on which the Insured's age at nearest birthday is 60 years and subsequent to the delivery hereof, has become wholly disabled by bodily injury or disease so that he is and will be, presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days. * *. Then -

(1) WAIVER OF PREMIUM. Commencing with the anniversary of the Policy next succeeding the receipt of such proof, the Company will on each anniversary waive payment of the premium for the ensuing insurance year. * *.

(2) LIFE INCOME TO INSURED. One year after the anniversary of the Policy next succeeding the receipt of such proof, the Company will pay the Insured a sum equal to one-tenth of the face of the Policy and a like sum on each anniversary thereafter during the lifetime and continued disability of the Insured. * *

(3) RECOVERY FROM INCAPACITY. The Company may at any time and from time to time, but not oftener than once a year, demand due proof of such continued disability, and upon failure to furnish such proof, or if it appears that the Insured is no longer wholly disabled as aforesaid, no further premiums shall be waived nor income payments made."

The declaration, filed on April 13, 1918, by Isaac Spilky, conservator, etc., consists of one special count in which the policy is set out in full. Plaintiff alleges that after the issuance of the policy he (Isaac Spilky), "until 1922, paid premiums each year, as specified and the policy has at all times been maintained in full force," that "on, to-wit, January 1, 1921" (error as to year the Insured, Joseph L. Spilky, "became insane, and has since been completely and wholly incapacitated from engaging in any occupation whatsoever for remuneration or profit;" and that after said date he, "by reason of his said insanity, was unable to and did not notify defendant of such disability." The declaration concludes with the claim that plaintiff, as conservator, is entitled to recover back all premiums paid on the policy since 1921, and also to recover from defendant \$200 a year for each year since 1921, and also interest at the legal rate on the several amounts. To the declaration

the company filed a plea of the general issue.

The bill of exceptions discloses that before the trial the parties stipulated and agreed in writing that a jury trial be waived and that the cause be submitted to the court upon the following facts:

(1) The policy was issued to Joseph L. Spilky and took effect as of June 22, 1918, at which time he was 29 years of age.

(2) While the policy was in force and "commencing January 1, 1924," the insured "became wholly disabled by bodily injury or disease so that he was and will be presumably thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and said disability has continued thence hitherto and was mental incapacity or mental disease."

(3) That "defendant did not know or have notice of said disability until October 24, 1927, upon which date it for the first time received documentary proofs of said disability, filed by Isaac Spilky, insured's father."

(4) That "defendant approved said proofs of disability as sufficient evidence of disability of the insured under the first paragraph of Section 1 of the policy, and, commencing with the anniversary of the policy next succeeding their receipt (viz., June 22, 1928), and on each anniversary of the policy thereafter, did waive payment of premium, and one year after the anniversary next succeeding receipt of such proofs (viz., June 22, 1929), did pay to the insured, or to the plaintiff as his legal representative, a sum equal to one-tenth of the face amount of the policy (\$200), but did and does decline to waive any premium or to make any payment of disability income for any period prior to the anniversary of said policy following receipt of said proofs of disability, because of the fact that defendant received no notice or proof of such disability of the insured prior to October, 1927."

In the stipulation it also was agreed that "the following statements are facts, but their admissibility in evidence is subject to the objection of either party at the trial:

A. The original policy, after its delivery, was in the possession of the insured, or of his father, Isaac Spilky, and thence hitherto.

B. Isaac Spilky paid all the premiums until payment thereof was waived by defendant as hereinbefore stated.

C. Isaac Spilky did not read the policy prior to October, 1927."

In the stipulation it also was agreed that, upon the trial, the court shall indicate his rulings upon the admissibility in evidence as to "A, B and C" by endorsing "admitted" or "not admitted" on the margin; that, "if the court finds the issues in favor of

The bill of exchange is a bill of exchange which is drawn on a bank or other financial institution and is payable to order of the holder. It is a negotiable instrument and can be transferred to another person by endorsement.

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(5) The bill of exchange is a bill of exchange which is drawn on a bank or other financial institution and is payable to order of the holder. It is a negotiable instrument and can be transferred to another person by endorsement.

plaintiff, the amount of damages thereby to be assessed is the sum of \$969.80, and costs;" that if the court finds the issues in favor of defendant, costs shall be assessed against plaintiff; that an appropriate judgment be entered on either such finding; and that either party may have the judgment reviewed by appeal or writ of error.

The bill of exceptions further disclosed that the stipulation and policy were introduced in evidence; that over defendant's attorney's objection the three facts, "A, B and C" as above, were deemed competent and material and the court marked the same "admitted" on the margin of the stipulation; that certain propositions of law were submitted by each party which the court marked either "held" or "refused;" and that the court made the finding and entered the judgment as first above mentioned.

Defendant's proposition No. 2, which was marked "refused," is to the effect that the provision in section 1 of the policy, relating to the receipt by the company of proof of disability of the insured, "is a condition precedent to the commencement of all liability for disability benefits." Plaintiff's proposition No. 1, marked "held," is to the effect that the insured, by reason of his insanity from January 1, 1934, was "excused from giving notice," as required by the policy, of the disability ensuing from such insanity. Plaintiff's propositions, Nos. 2 and 3, each marked "held," are to the effect that plaintiff is entitled to recover "notwithstanding the fact that he failed to give notice of his disability;" and that the notice thereof, given by his father, Isaac Pilky, within a reasonable time after the latter "discovered" that the policy insured against disability of the insured, "was a sufficient compliance with the terms of said policy."

Under the provisions of said section 1 of the policy,

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a genuine organization or a front organization for the Soviet Union.

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as above set forth, we think it clear that until the company received "due proof" of insured's disability, occasioned by bodily injury or disease, it was not required to waive the payment of any premium and was not liable to pay any disability benefits at the times and for the amounts specified. As regard the receipt by it of such proof as a condition precedent to its being required to waive payment of any premium, and to its liability to pay any disability benefits. (Foster v. Mutual Security Co., 316 Ill. 582, 583; Sullivan v. American Alliance Ins. Co., 280 Ill. App. 476, 479; American Home Circle v. Rogers, 127 Ill. App. 595, 596.)

Upon the trial plaintiff's contention, in view of the stipulated facts as above, that the company should make reimbursement of such paid premiums and should also pay the disability benefits for said prior years, for the reason that the insured, being insured, was "excused" from furnishing proofs of such disability as required by the policy. It is apparent from the trial court's rulings on the propositions of law as above mentioned, and from its finding and judgment, that it agreed with plaintiff's contentions. We are of the opinion that, under the provisions of the policy and the undisputed facts, these contentions (also urged here) are not in accord with the general current of the decisions in this and other States.

In a note in 13 American Law Reports, page 318, the writer states: "The rule appears to be well settled that insanity or incapacitating sickness of the insured, because of which he fails to pay, when due, a premium or assessment on an insurance policy, will not excuse such failure so as to prevent a forfeiture, termination or suspension of his rights, where the policy * * expressly provides for such forfeiture, termination or suspension in the event of non-payment." Under this statement are cited many cases.

There are three main points in the report of the
Committee on the subject of the "National
Council of Education" which are of importance
to the public. The first is the question of
the organization of the Council. The second is
the question of the Council's functions. The
third is the question of the Council's
relations to the Government.

among which are Grand Lodge etc. v. Jesse, 50 Ill. App. 101, and Schreiber v. Protected Home Circle, 146 Ill. App. 570. In the Jesse case (p. 109) it is held in substance that insanity furnishes no excuse for the nonpayment by the insured of an assessment in a benefit society. In the Schreiber case (p. 580) it is said: "Insanity does not relieve the insured from any obligation imposed by the terms of his insurance certificate, with the sole exception of personal attendance in complying with requisite conditions, that may be done by another for him." In Heal v. Modern Woodmen, 61 Ill. App. 597, 602, it is decided that, where there is no claim that the insured lacked power or mental capacity to enter into the contract, or that it is invalid for any reason, "his subsequent mental incapacity could not relieve him from a compliance with its regulations any more than in any other form of contract." In Hanson v. Henthingsharn Nat. Life Ins. Co., 220 Ill. App. 12, 20-21, it is held in substance that the rule of strict construction of an insurance policy against the insurer cannot operate to nullify the clear and specific provision of an "agreement supplementary" to a life policy, which provided for the waiver of premiums during the period of total disability of the insured upon the furnishing to the insurer of proof satisfactory to it of such disability and the suitable endorsement thereof by the insurer on the agreement. In Bourson, Exec. v. New York Life Ins. Co., 295 Pa. St. 516, the policy contained somewhat similar provisions to those in the one here involved, and it is held in substance that the furnishing of proof satisfactory to the company of the insured's disability is a condition precedent to a waiver of premiums, and that, where the insured becomes wholly disabled by insanity and without giving notice of such disability continues to pay the premiums for several years until his death, his personal representative cannot recover back from the company the amount of the premiums so paid. The Pennsylvania court

In its opinion refers to the cases, in supporting its conclusions, of Whiteside v. North American Ins. Co., 301 N. Y. 187, and New England Frl. Life Ins. Co. v. Whiteside, 317 Ala. 267 (216 So. 2d. 191), and further says (pp. 522-3):

"The requirement of notice of the disability before the company acted was a salutary one. It enabled the company to investigate before waiving payment of the premiums and guard it against malingerers and frauds. We are not here concerned with the lapsing of the policy; it was in full force when death came and the insured's beneficiary is now receiving the sums which the policy provides. What is being tried is to recover back the premiums paid without having given the company opportunity to look into the matter while its insured was alive as to whether his actual disability was such as to lead the company to waive their payment. * * Here we are not dealing with the lapsing of a policy because the premium was not paid as a result of insanity with a disability clause in effect, but with an endeavor to take back the premiums paid where the insured had not met the requirements of the contract."

Our conclusion is that the Superior Court committed an error of law in entering the judgment appealed from against the defendant company, and that it must be reversed. Inasmuch as the cause was tried without a jury, and upon stipulated facts, the cause will not be remanded.

JUDGMENT REVERSED.

Barnes, P. J., and Scudlan, J., concur.

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1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator must first identify the problem and then determine the scope of the investigation. This is done by the investigator who is assigned to the case. The investigator must first identify the problem and then determine the scope of the investigation. This is done by the investigator who is assigned to the case.

1. The Commission is of the opinion that the Commission should be authorized to conduct investigations and to make recommendations to the President in regard to the removal of any officer or employee of the Government who is found to be incompetent, inefficient, or otherwise unfit for his position.

* Source: U.S. Department of Commerce, Bureau of Economic Analysis.

34083

GEORGE YLONEN,
Appellee,

v.

JULIUS LIEDER and
CLARENCE LIEDER,
Appellants.

1337
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seeks to reverse a judgment for \$3000 rendered against them on November 23, 1929, following the verdict of a jury, in an action for damages for malicious prosecution.

In plaintiff's declaration, filed March 12, 1928, and to which defendants filed a plea of not guilty, the averments are in substance that on October 5, 1927, defendants appeared before one of the judges of the municipal court of Chicago and, "falsely and maliciously, and without any reasonable or probable cause," charged plaintiff with having burglarized their garage of one electric drill and one acetylene torch of the value of \$85; that upon a warrant issued he was arrested and imprisoned for about 24 hours; that on October 26, 1927, after a hearing on the complaint, the court held him to the grand jury; that subsequently the grand jury returned a "no bill" and he was fully acquitted of the supposed offense and the proceedings were terminated; and that by reason of said happenings he has been greatly injured in his credit, reputation, etc.

The evidence disclosed the following facts in substance: about June 1, 1927, defendants Julius Lieder and Clarence Lieder, father and son, purchased a garage, located on the northwest corner

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On 11th August 1944, the ship was sighted by the crew of the U.S.S. "Albatross" (AG-42) while on a patrol mission in the North Atlantic. The ship was identified as a German merchant vessel and was subsequently sunk by the U.S.S. "Albatross" on 12th August 1944. The ship was carrying a cargo of various goods, including foodstuffs and medical supplies, and was believed to be en route to a port in Europe. The sinking of the ship was a significant event in the Battle of the Atlantic, and the ship's cargo was recovered and distributed to the Allied forces in Europe.

in January 1947, the following information was received from the Bureau of the Census, Washington, D. C.:

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a legitimate organization or a subversive group.

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of Oakley Boulevard and Division street, Chicago, and known as the Oakley Motor Sales Garage. Thereafter Clarence Lieder managed the business. When the purchase was made five employees in the garage were retained, including plaintiff and one John Repta, as mechanics. Early in September, 1927, fault was found with certain work performed by plaintiff and about the end of the month he was discharged. On Sunday morning, October 2nd, about 8:30 o'clock, Clarence Lieder and Repta discovered that an electric drill and an acetylene torch were missing from the repair shop of the garage. Believing that the articles had been stolen Lieder telephoned a police station. Later in the morning a police detective, Louis Frank, accompanied by another police officer, came to the garage and further investigations were made. Frank called all employees together and questioned them in the presence of Lieder. Repta said that shortly before plaintiff left defendants' employ he proposed to him (Repta) that they steal the drill and torch, but that he (Repta) refused the proposition. Arthur Berger, another mechanic employed by defendants at the time, told Frank and Lieder that he had seen the drill and torch in the shop late on the preceding night. Further investigations then made disclosed that there was no evidence of a forcible entry into the garage but that one familiar with the surroundings could have entered through one of the entrances by separating the doors and putting his hand through the opening and raising the latch. On Monday morning plaintiff called at the garage and had a dispute with Julius Lieder over wages for certain overtime work which he claimed to be due him. On Wednesday morning, October 5th, Frank, the police detective, accompanied by plaintiff, came to the garage and, in the presence of plaintiff, Berger and Clarence Lieder, asked Repta to repeat what he had said on Sunday morning in reference to the conversation he had had with plaintiff, and thereupon Repta

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repeated the statement that plaintiff had suggested to him that they (Hepta and plaintiff) steal the drill and torch, and thereupon plaintiff said that he had made that proposition to Hepta, but he denied that he (plaintiff) had taken or stolen either the drill or the torch. Thereupon, at Frank's suggestion, Clarence Lieder went to the police station and signed and swore to the complaint, mentioned in plaintiff's declaration. Under the warrant then issued plaintiff was arrested and held in custody until the following afternoon (October 6th) when he was released on bail. On the trial of the criminal suit Clarence Lieder, Frank, Berger and Hepta testified for the People and plaintiff was a witness in his own behalf. The municipal court held plaintiff to the grand jury. On December 3, 1927, as appears from a record of the Criminal Court of Cook county, certified to by the clerk of that court and introduced in evidence by plaintiff, the grand jury returned a "no bill" in said criminal case and plaintiff was released and the case was terminated.

The main contention of defendants' counsel is that the verdict and judgment in the present action are manifestly against the weight of the evidence on the essential question whether defendant had any reasonable or probable cause for believing that plaintiff had committed the offense as charged, and for instituting and prosecuting the proceedings against him. We think that the contention is meritorious. In McIlroy v. Catholic Press Co., 254 Ill. 290, 293, it is said: "Two facts are essential to sustain an action for malicious prosecution: First, malice; and second, want of probable cause." In the same case it is also said (p. 294): "The existence of malice did not tend to prove a want of probable cause, for although malice may be inferred from a want of probable cause, the absence of probable cause cannot be inferred from malice." In Marple v. Whitney

1. The first of these is the fact that the system is not a simple one, but a complex one, involving many different factors and many different people.

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sent to them. Attached are the notes of our first meeting on 11/11/11.

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77 Ill. 32, 42, it is said: "Probable cause is defined as such a state of facts, in the mind of the prosecutor, as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty. " " It does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution." (See, also, Slang v. Lawrence, 280 Ill. 581, 587.) In Anderson v. Friend, 85 Ill. 132, 136, it is said; "Prosecuting witnesses must be protected where they act in good faith on facts and circumstances which are such as to induce a belief of guilt in the mind of a reasonable person. This has ever been the rule of the law. The issue, then, for the jury to try is not the guilt of the plaintiff. If the defendant acted in good faith on evidence, whether true or false, which is sufficient to create a reasonable belief that the accused was guilty of the offense; he is protected.

We are of the opinion that the evidence in the present case (as above outlined) discloses that defendants had reasonable and probable cause for believing that plaintiff was guilty of the charge made against him, and that, under the rules enunciated in the cases above mentioned, the judgment appealed from cannot stand.

It is unnecessary for us to consider the other grounds for reversal of the judgment, as urged, viz., claimed errors in the court's rulings on the admissibility of certain offered testimony, and in the giving of certain instructions offered by plaintiff.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

34101

JOHN LEONARD HILL,
Appellee,

v.

KELVINATOR CHICAGO COMPANY,
a corporation,
Appellant.

1347
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

257 I.A. 651⁵

MR. JUSTICE GRILEY DELIVERED THE OPINION OF THE COURT.

On January 11, 1929, plaintiff commenced a 4th class action in contract against defendant to recover back the sum of \$300, paid by him in part payment for three refrigerators, or machines, under a written contract or order dated August 21, 1928. He based his action upon defendant's breach, as claimed, of its implied warranty that the machines were reasonably fit for the purpose intended. There was a trial without a jury, resulting in a finding in plaintiff's favor and assessing his damages at \$300. Judgment on the finding was entered against defendant on November 2, 1929, and the present appeal followed.

The contract, signed by the parties in Chicago on the day of its date, is headed "Kelvinator Order." By it defendant agrees to sell to plaintiff, the purchaser, and install in his three-flat building at No. 7828 Kingston avenue, Chicago, three "Kelvinator Models, No. L-5 E" at the price of \$400, to be paid on September 20, 1929. The contract further provides that, "until the purchase price is paid in full, the merchandise, and additions or substitutions thereto, shall be and will remain the seller's property;" that the purchaser is not to remove the merchandise from said address without first obtaining the seller's written consent; and that in case of the purchaser's default in any of his obligations, or if the seller

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U.S. DEPT. OF AGRICULTURE
WASHINGTON

TO THE SECRETARY OF AGRICULTURE, WASHINGTON, D.C.

Dear Sir, I have the honor to acknowledge the receipt of your letter of the 10th inst.

in relation to the matter of the proposed amendment to the act of March 3, 1907.

I have given the matter very careful consideration, and I am glad to hear that you are so anxious to have the law amended.

I have also given consideration to the proposed amendment, and I am glad to hear that you are so anxious to have the law amended.

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I have also given consideration to the proposed amendment, and I am glad to hear that you are so anxious to have the law amended.

I am, Sir, very respectfully,
Yours very truly,
J. B. HARRIS

The enclosed, signed by the Secretary of Agriculture, is for the use of the Department of Agriculture.

I am, Sir, very respectfully,
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J. B. HARRIS

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deems the merchandise in danger of misuse or confiscation, the entire amount shall become immediately due and payable, and the seller may, without notice and without process, take possession of said merchandise, and all payments made by the purchaser "are to be deemed and considered as having been made for the use of, and liquidated damages on, said merchandise, and shall be retained by the seller, and the seller may re-sell said merchandise so re-taken at public or private sale." There is also the following provision:

"If any replacements are necessary because of defects in workmanship and materials of Helvinator and Miser units manufactured by Helvinator Corporation, they will be made free of charge, f. o. b. Detroit, Michigan, for twelve months. Service accommodations will be furnished by seller without cost for three months, both from date of installation. Unauthorized change in the use of said units, or deviation from their published refrigerating capacity, automatically cancels this warranty."

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In plaintiff's statement of claim ^{he} alleged in substance that after the contract was signed the three Helvintors were installed in his building; that thereafter he paid to defendant \$300 on account; that thereafter, because of their faulty construction, "odors of sulphur dioxide gas escaped, which proved a menace to the life and health of the tenants occupying the apartments in which the Helvintors were installed;" that thereafter defendant made various unsuccessful attempts to repair them; that thereafter, on or about December 10, 1928, defendant took possession of them and removed them from plaintiff's premises; and that defendant, although often requested, has refused to return to plaintiff said \$300.

In defendant's amended affidavit of merits it admitted ^{the} the installation of ^{the} refrigerators, the payment by plaintiff of \$300 on account and its acceptance of the money on or about October 2, 1928, and that numerous complaints of escaping gas, after installation,

were received from plaintiff and his tenants. It alleged in substance that at different times it inspected the refrigerators and made adjustments, repairs or substitutions thereto; that finally and prior to December 10, 1928, all were properly installed and properly functioning; that plaintiff refused to pay after demand the balance of \$180, due on the contract price, and thereby became in default; that defendant thereupon elected to take possession of the refrigerators, and on December 10, 1928, did so, and removed them from plaintiff's premises; that thereby the \$300 previously paid by plaintiff became forfeited as liquidated damages under the provisions of the contract; and that defendant is not indebted to plaintiff any sum.

On the trial, plaintiff, who owned the flat building and who occupied the first floor apartment where one of the refrigerators was installed, gave testimony, and Mark E. Morrissey and Harry D. Gans, tenants on the second and third floors, respectively, and on which floors the other refrigerators were installed, also testified for plaintiff. On defendant's behalf A. J. Anderson, its office manager, testified, as did three of its service and repair men, Fussett, Munson and L. C. Anderson. Defendant also called as an expert witness, H. B. Kharsach, a professor of chemistry, who testified as to the qualities of sulphur dioxide gas and the probable effects upon occupants of rooms where such gas is escaping in varying quantities from containers.

The evidence is conflicting as to the date when the refrigerators were installed and put in operation but it appears from a preponderance of the evidence that they were first installed in pantries of the three flats about the last of August, 1928. Plaintiff did not make any payment on his contract until October 2, 1928, when he sent a check to defendant for \$300 on account. This check was immediately cashed by defendant and it did not then raise any objection that the entire \$480 was not paid, although the contract

new version from slightly and his statement. It appears in sub-
stance that at various times in the past the witnesses had
made statements, together on occasions, showing that finally
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from the witnesses' presence that finally the witnesses
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It immediately seemed to Gladys that it was not a real thing
Gladys that the witnesses had not paid, although the contract

provided that that entire sum should be paid by September 30th. In a letter enclosing the check plaintiff wrote in part: "I would pay the balance were it not for one of your machines not working properly. There appears to be a knock in the pump at times, and my tenant complains of an odor coming from the freezer which destroys the food. Your repair man has been out trying to adjust same, and states that it happens now and then that your boxes don't work right, and you are obliged to replace them. * * If the matter clears up within the next 30 days, I will remit the balance." Plaintiff testified in substance that after he had paid the \$300 he had "plenty of trouble with the machines;" that just after October 2nd, the tenant on the third floor (Gens) complained, and he (plaintiff) ascertained that the machine there "was not freezing properly;" that shortly thereafter a repair man came and claimed that he had put it in proper order; that a few days later Gens complained again and, upon further investigation, plaintiff noticed an odor, like the smell of sulphur, coming from the box; that a repair man again came and made further repairs, but still the machine did not work satisfactorily; that repair men made repairs five or six times and finally removed the third floor machine and put in another one in November, but it thereafter at times "leaked gas;" that plaintiff received complaints from the second floor tenant, Hertzog, about the middle of November; that upon investigation plaintiff found that "sulphur dioxide gas was seeping;" that a repair man of defendant came and made repairs on different occasions but that the trouble was not remedied; that the first trouble plaintiff had with the machine in his own flat was about the middle of November; that it "was not freezing right;" that repair men of defendant came several times but the trouble was not remedied; that about the middle of November he received a demand from defendant for payment of the balance due; that he replied by letter that the machines were not

[illegible]

yet working satisfactorily; that further complaints were made by his tenants; that on November 24, 1928, he wrote to defendant saying in part: "After a fair trial of your refrigerators * *. I find they are of faulty construction, dangerous to health, and therefore will request you to take them back, and to return to me the \$300 advanced to you;" that further correspondence and telephone conversations were had but defendant refused to take them back; and that on December 10, 1928, defendant's men came and took away all three machines.

The testimony of the witnesses, Gans and Merrisey, corroborated that of plaintiff in essential particulars. Gans testified that he first had trouble with the machine in his apartment about a week after installation, in that it was not freezing properly and spoiled the food; that after defendant's men had made repairs it worked all right for a few days but afterwards "sulphur dioxide fumes" escaped; that further repairs were made without success and defendant's men removed the machine and installed another one; that it worked all right for a few days and then the odor of escaping gas again became noticeable and finally he (Gans) detached it, ceased to use it, and put it outdoors on the back porch. Gans further testified that "when one smells sulphur dioxide gas it creates a choking feeling and makes one want to get away from it and out of the house." Jasset, defendant's witness and one of its repair men, testified that on November 6, 1928, in answer to a trouble call, he went to said third floor apartment and found the Kelvinator on the back porch, and "leaking gas." The testimony of defendant's other repair men was to the effect that trouble developed in all three machines, that numerous and necessary repairs were made on them from time to time, but that finally, before defendant removed the machines, all were working properly except the one on the third floor which had been disconnected by the tenant. Kharasch, defendant's expert witness, testified on cross-examination that "sulphur dioxide gas will kill any person if he stays long enough in a sufficient amount of the

For writing this letter, I am indebted to the following persons:

The following persons have been consulted in the preparation of this letter: Mr. J. H. ...

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gas;" that its odor "would awaken a sleeping person;" that "if gas escaped, as it did from the Kelvinator on the third floor, - in this case into a room of 122 cubic feet air space, - and the door of the room was closed, and a person walked into the room, the gas would strike him right straight in the face;" that "if he inhaled on going into the room and carrying out some operations and inhaled a large quantity he probably would get sick;" and that "if a child walked in there, and the gas was strong enough, it probably would make him vomit." A. E. Anderson, defendant's office manager, testified that he conversed with plaintiff several times over the telephone about December 6th and 7th; that he demanded payment of the balance due on the contract, but plaintiff refused, and said that "He didn't want the refrigerators any more, and that defendant should come and take them out;" that he (the witness) replied that defendant would not do this, and that, if plaintiff did not immediately pay said balance, defendant would "take them out according to the contract;" that plaintiff demanded the return of the \$300 which he had paid, and that the witness told plaintiff to see defendant's lawyer; that thereafter, under the witness' orders, defendant's men called at the building and took away all three machines; and that they are now in defendant's possession.

Defendant's counsel here contends in substance that the finding and judgment are manifestly against the weight of the evidence and against the law. Counsel argues that plaintiff did not make any attempt to rescind his contract for the purchase of the machines until about November 24, 1928, which was long after a reasonable time for a trial or test of them had elapsed, nor did he then properly tender them to defendant. After considering the entire evidence, the contract between the parties, certain provisions of the Uniform Sales Act of Illinois and certain Illinois decisions, we cannot agree with counsel's contention or argument.

In section 15 of said Uniform Sales Act (Cahill's Stat., 1929, Chap. 121a, p. 2302) it is provided in part:

"Subject to the provisions of this Act, * * there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. * *

(2) An express warranty or condition does not negative a warranty or condition implied under this Act unless inconsistent therewith."

In section 59 of said Act (Cahill's Stat., 1929, p. 2308) it is provided in part:

"(1) Where there is a breach of warranty by the seller, the buyer may, at this election -

(a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price. * *

(b) Rescind the contract to sell or the sale and refuse to receive the goods, or, if the goods have already been received, return them, or offer to return them to the seller and recover the price or any part thereof which has been paid. * *

(3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. * *

(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price. * * "

The facts of the present case are somewhat similar to those in Connor v. Borland-Grannis Co., 294 Ill. 58. The opinion in that case discloses the following facts: The plaintiff contracted with the defendant for the delivery to her of a certain electric automobile at the price of \$3100, and \$50 was paid on the signing of the contract, and it was agreed that the balance was to

© 2000 Blackwell Science Ltd *Journal of Internal Medicine* 247: 395–401

From the following table it is seen that

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(S) The above information was obtained from a confidential source who has provided reliable information in the past.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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(3) - When the goods were delivered to the buyer, the seller stated that it was his intention to sell the goods to the buyer for the purpose of the buyer's business, and that the goods were to be used for the buyer's business. The seller also stated that the goods were to be sold to the buyer for the purpose of the buyer's business, and that the goods were to be used for the buyer's business.

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of various materials. The most commonly used is steel, and it is

There is a strong relationship between the two variables.

THE FOLLOWING INFORMATION IS FOR YOUR INFORMATION ONLY

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1944-1945

THE UNIVERSITY OF CHICAGO PRESS

be paid by the delivery to defendant of another electric car at \$1200, \$200 in cash and the balance by notes. The automobile was to remain the property of defendant until fully paid for. The seller (defendant) made certain guaranties against defective material and workmanship for twelve months. The car was delivered in June, 1913, and plaintiff paid the \$200 cash and gave notes, coming due every thirty days, secured by chattel mortgage. Though plaintiff claimed that the car was not according to contract, she nevertheless made payments until October 9, 1913, when she gave her check for \$204, on which she endorsed that the payment was made under protest, on condition that defendant should furnish her with a car as contracted and subject to her approval. The check was immediately returned, and the car was taken by defendant under the chattel mortgage and sold on October 25th. Plaintiff commenced suit in the Superior court of Cook county and, after verdict, recovered a judgment against defendant for \$1850, - the amount she had paid on the purchase price of the car. On writ of error the appellate court reversed the judgment and remanded the cause, - holding that plaintiff, by her conduct in retaining and continuing to use the car and by her payment of the notes secured by the mortgage as they fell due, waived her right to rescind the sale. On motion of defendant in the appellate court, that portion of the court's order remanding the cause was stricken out and final judgment was entered against plaintiff and she was allowed a writ of certiorari. On the hearing before the Supreme Court the appellate court's judgment was reversed and the superior court's judgment was affirmed. It further appears from the opinion of the Supreme Court (p. 31) that "the question upon which the result of the suit depended was whether the plaintiff had a right to rescind the sale;" that the evidence introduced on plaintiff's behalf showed that she was a doctor and used the car

in her practice, that the car was not in accordance with the contract and was defective in certain particulars in material and workmanship, that she had constant trouble with it, that she had it at defendant's service station on four occasions, and that she was at all times ready to pay for it if it was fixed as it ought to be; and that "she was led to keep the car as long as she did in the expectation and belief that the defects would be remedied." In affirming the judgment of the superior court in her favor the Supreme Court said (pp. 62-63). (italics ours):

"It is a rule of law that if a purchaser desires to rescind a contract of sale and return the article purchased he must offer it back as soon as he discovers the breach or after he has had a reasonable time for examination, and he waives the right to rescind by continuing to use the article for a longer time than is reasonable for a trial and must have recourse to his action for damages in a suit for a breach of warranty or as a defense to a suit for the contract price. * * The alleged defects in this car which the evidence for the plaintiff tended to prove could only be discovered by use by the plaintiff. The question whether she retained the car longer than was reasonably necessary depended upon all the facts and circumstances in evidence. * * The law fixes no time for the return of an article under such conditions, and it was a question for the jury to decide from the evidence whether the retention of the car, which was returned several times to the service station and repaired at other times, was for more than a reasonable time for plaintiff to decide whether she would keep the car or not. Such a question could only be one of law for a court if the circumstances were such that all reasonable minds could agree that the car was retained under such conditions that there would be a waiver of the right to rescind, and surely that was not the case here. * * The length of time the plaintiff kept the car, unexplained, would furnish very strong ground for the belief that the alleged defects were not substantial or that she had concluded to keep the car even if it was not made to conform to the contract, but all the circumstances and everything which tended to show a reasonable belief on her part that the defects would be remedied were to be taken into account. The appellate court erred in holding, as a matter of law, that the plaintiff had waived her right to rescind the sale."

"We think that the above holdings and decision of our Supreme Court are particularly applicable to the facts of the present case, that it was for the municipal court sitting in place of a jury to determine from all the evidence the question whether plaintiff elected within a reasonable time to rescind

his contract of purchase of the refrigerating machines in question, and that the court's finding and judgment should not be disturbed. It is apparent from all the facts and circumstances in evidence in the present case that plaintiff's delay in making his election to rescind the contract was due to a reasonable expectation and belief on his part that defendant could and would remedy the defects in the machines, which it did not do. (See, also, Berrance v. Fairbank Power Co., 233 Ill. 364, 361; Bryke v. Instant Heat Co., 236 Ill. App. 278, 279-80.)

The judgment of the Municipal court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

The conduct of business of the corporation is such
that, and also the corporation's financial and business affairs are so
conducted, it is apparent from all the facts and circumstances
as set forth in the present case that the corporation's policy is to
the effect that it is to be managed in such a way as to be a successful

corporation and to be able to pay its debts and to be able to
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It is the policy of the corporation to be able to pay its debts and to be able to pay its taxes and to be able to pay its other obligations.

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33939

LEWIS C. BROWN,
Defendant in Error,

v.

INTERSTATE GARAGE CORPORATION,
Plaintiff in Error.

REPORT TO SUPERIOR
COURT, COOK COUNTY.

257 I.A. 652

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Lewis C. Brown, plaintiff, brought an action in accounit against Interstate Garage Corporation, a corporation, defendant. Upon trial of the issues by a jury, a verdict in favor of plaintiff for \$4,800 was rendered. Judgment was entered on the verdict and defendant has sued out this writ of error.

Plaintiff's amended declaration consists of two special counts and the consolidated common counts. The first special count alleges a written proposal from defendant to plaintiff, dated March 31, 1924, and by plaintiff accepted. The second special count alleges that plaintiff and defendant, on September 1, 1924, entered into certain additional contracts. As plaintiff, in his brief, states that he does not rely upon the contracts set up in the first and second special counts it is unnecessary to further refer to them. The affidavit of claim filed with the amended declaration sets out that "his demand is for moneys due pursuant to terms of written contract set forth in above declaration, and in addition thereto to \$3,200 pursuant to terms of contract set forth in said amended declaration; that there is due from defendant to plaintiff the sum of \$103,200." Defendant also filed a copy of instrument and account sued on, which includes a verbatim copy of the contract set out in the first count of the amended declaration and also the following:

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| "To amount due under above contract | \$100,000 |
| To amount due for sale of capital stock of
Interstate Garage Corporation..... | 3,200" |

Plaintiff's amended bill of particulars states that

"Plaintiff's suit is on written contract, copy of which is attached to plaintiff's amended declaration. There is due on said contract \$100,000 as set forth in said declaration. Plaintiff's further claim is for the sum of \$3,200 due under the terms of verbal contract whereby defendant promised plaintiff 15% in par value of Interstate Garage stock, plaintiff's total claim being \$103,200."

Thereafter plaintiff filed an additional count to his amended declaration which alleges that on December 30, 1922, plaintiff and defendant entered into a contract whereby defendant agreed to issue to plaintiff or to his order \$100,000 in amount of Class B common stock of defendant, provided plaintiff should introduce defendant to parties who would present to defendant a plan for financing and erecting a building for garage purposes on its property; that thereafter, and on the same day, plaintiff introduced defendant to parties who presented a plan for erecting said building for garage purposes as provided in said contract; that plaintiff did all things required of him by said contract and afterwards demanded of defendant that it issue to plaintiff its stock as provided in said contract; that said stock was at the time of said demand of the value of \$100,000 and that defendant has refused to issue such stock or pay plaintiff the value thereof, wherefore plaintiff brings suit.

In plaintiff's brief appears the followings:

"Points relied on.

Plaintiff relies on the contract of December 30, 1922, and full compliance by him with that contract.

Plaintiff relies on an implied quantum meruit contract with defendant, and full compliance by plaintiff with that contract."

Plaintiff, however, does not argue the second point and it may therefore be considered waived. We may add, however, that plaintiff's affidavit of claim and bill of particulars would not sustain an implied contract, as plaintiff also states, in his brief, that the

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2294 J. J. O'Brien and others

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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THE UNIVERSITY OF CHICAGO

Received 10 October 1993; accepted 12 November 1993

DATE OF RECEIPT BY ADDRESSEE

100-443887-100

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Table 1. *Continued*

(The following information was obtained from the records of the Department of Health, Education and Welfare, Office of the Assistant Secretary for Health Policy and Statistics, Division of Health Statistics, Bureau of Vital Statistics, Washington, D.C.)

1911

1947-1948

Full conditions for this visit: [here](#)

SECRETION OF THE PANCREAS

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Revised by author, 1970-1971; 1976-1978

100% recovery of blood was obtained in all cases and the amount of blood

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\$3,200 item set up in the account sued on and in the amended bill of particulars - and which is the only item based upon a verbal contract - may be considered as out of the case for the reason that his evidence showed that plaintiff's contract as to this item was with Homer Jackson individually.

Defendant, an Illinois corporation, was organized for the purpose of purchasing real estate and erecting thereon a building for garage purposes. Its authorized capital stock was \$1,750,000, consisting of \$750,000 preferred stock and \$1,000,000 common stock. Subsequently the common stock was changed to 40,000 shares of Class A common stock of the par value of \$10 per share and 60,000 of Class B common stock of the par value of \$10 per share. The preferred and Class A stock were qualified for sale under the Illinois Securities Act and sales of said stock were continued until December 30, 1932. Plaintiff was employed in 1931 to sell defendant's preferred and Class A stock and it is conceded that he sold something in excess of \$200,000 par value of such stock. Homer D. Jackson was president and Wing Kley was secretary of defendant corporation. Defendant contracted to purchase or lease eight lots located at the corner of Wabash Avenue and South Water Street, Chicago, for a total consideration of approximately \$900,000, and from the proceeds of its stock sales paid on said contracts about \$150,000. It acquired title to two of the lots, paid certain moneys on account of the same and gave back mortgages on the same, and it also acquired a ninety-nine year lease on another of the lots. About December 31, 1932, defendant found that money was not coming in fast enough from the stock sales to keep up the payments due on its property and it was in default on the mortgages. It thereupon ceased to sell stock and plaintiff's activities as a stock salesman then ended. Defendant then entered into negotiations with several parties for the sale of its equities, and in 1934 sold its real estate equities to Riverside

Plaza Corporation and received as payment therefor preferred stock of the latter company of the par value of \$375,000. Thereafter defendant liquidated and distributed its assets, and its stockholders and creditors received in the distribution the said stock of Riverside Plaza Corporation. The only connection or relation defendant had with the Plaza Corporation was the sale of its equities to the latter. They were separate and distinct corporations and none of the officers of defendant was an officer of the Plaza Corporation or was in any way connected with it except as a holder of its stock received in distribution of the assets of defendant. The Plaza Corporation subsequently financed and erected a building on the premises in question.

Defendant contends that the evidence in the record clearly shows that the only agreement plaintiff made on December 30, 1923, was with H. D. Jackson and Nina Wey as individuals and not as officers of defendant corporation, and therefore plaintiff was not entitled to recover against defendant on account of the alleged contract of that date. After a very careful consideration of the evidence we are satisfied that this contention is a meritorious one. The undisputed evidence shows that at the time in question defendant did not own any of the Class B stock, and that it was all owned by Jackson and Wey. On December 30, 1923, plaintiff, Jackson and Wey had a conference and plaintiff submitted to them the following written document:

Interstate Garage Corporation
29 S. LaSalle Street
Chicago, Illinois.
Gentlemen:

I believe I am in a position to put you in touch with some people, or firm, whom I am interested in taking over, or at least helping to finance your corporation.

I offer to introduce you to such person, and assist in every way I can to get them to finance, or help you finance, your company on such basis as may be acceptable to you, with the understanding and upon the condition that if you make any deal or arrangement with such person or persons as I may introduce you to, or put you in touch with, you will give me \$100,000 in amount of your Class

B Common Stock as commission or compensation for my services. It is understood that this \$100,000 of common stock to be given to me will be issued to me or my order. This proposition must be good for at least fifteen days from the date hereof.

Yours very truly,

Dated: Chicago, Dec. 30, 1922.

Mr. L. C. Brown

Dear Sir:

We hereby accept your proposition as above set forth and authorize you to proceed immediately.

Dated, Chicago, December 30, 1922.

Interstate Garage Corporation

By
President

Attest:

.....
Secretary

Neither plaintiff nor defendant signed this document, but Jackson and Eley handed the following letter to plaintiff at the conference:

"December 30, 1922.

Mr. L. C. Brown
401 Tacoma Bldg.
Chicago, Illinois.

This is to confirm our understanding whereby we agree to issue to you or your order \$100,000.00 in amount of Class B common stock of the Interstate Garage Corporation.

This stock is to be issued to you or to your order provided you shall introduce us to parties who shall present to us a plan for financing and erecting the building for garage purposes on property at the N. E. corner of Tabash Ave., and E. Water Street, Chicago, Illinois.

This plan of financing must be complete, and be acceptable to us, and shall be presented and accepted within fifteen days from the date hereof, otherwise this offer shall be considered withdrawn and cancelled.

(Signed) H. L. Jackson
Wing Eley

Plaintiff, in support of his contention that the contract in question was with defendant, calls attention to a certain letter written by him to Jackson on June 17, 1925. This letter was written, according to plaintiff, "to get a settlement" and it is clearly of a self-serving nature, and it was introduced by defendant in connection with the cross-examination of plaintiff and for the evident purpose of contradicting certain statements made by plaintiff on his direct examination. Plaintiff contends that

as this letter was introduced without any limitation as to the effect of the same "it must therefore be construed as proof of all the matters therein contained. The contract of December 30 is specifically set forth in this Exhibit B offered by defendant. It also summarizes the work done by plaintiff under the contract and states why a formal extension of the contract beyond the fifteen days' period was not made." Evidence of prior statements of a witness contradictory of his testimony in a suit is not evidence that the prior statements are correct, but is evidence only of the repugnancy which tends to discredit his testimony in the suit. (See Johnson v. H. K. Fairbank Co., 136 (11. App. 381, 385, and cases cited therein.) Several of the points made by plaintiff in support of his claim that he made out a prima facie case against defendant as to the transaction of December 30, 1922, require no answer.

Defendant also contends that no matter with whom plaintiff made the agreement of December 30, 1922, the evidence shows nonperformance on his part. We do not consider it necessary to pass upon this contention.

The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

33976

SAMUEL H. GILBERT,
Plaintiff in Error.

v.

CHARLES H. HEWITT,
Defendant in Error.

ERROR TO COUNTY COURT,

COOK COUNTY.

257 I.A. 652²

MR. JUSTICE MCANLAN DELIVERED THE OPINION OF THE COURT.

Samuel H. Gilbert, plaintiff, sued Charles H. Hewitt, defendant, in the County Court of Cook County in an action of assumpsit. There was a trial before the court, with a jury, and the following verdict was returned: "We, the Jury, find the issues for the Plaintiff and assess Plaintiff's damages at the sum of \$498 plus interest at 6% per annum from the date of Plaintiff's bill, Oct. 27, 1935 to May 13, 1940." The court entered judgment in favor of plaintiff and against defendant for the sum of \$498, and plaintiff has prosecuted this writ of error. In the short bill of exceptions filed, plaintiff has not preserved the evidence heard upon the trial. The declaration alleged that defendant "was indebted to the plaintiff in the sum of \$1,108.00 for legal services and for work, care, diligence, journeys and attendance of the plaintiff by him before that time bestowed and performed as the attorney of and for the defendant at his request and for fees due to the plaintiff in respect thereof, and for materials and necessaries by the plaintiff provided in and about the said work for the defendant at his request." The affidavit of claim stated that plaintiff's demand was "a claim upon contract for the amount due as fees for legal services as described in the foregoing Declaration and in the copy of the account sued on filed herewith," and that there is due plaintiff after allowing to

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Journal of Management Inquiry 21(1)

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— *Journal of the American Medical Association*, 1997

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To achieve an all-planet goal for 2000, we need to achieve an all-planet goal for 2000.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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the authors are grateful to the referees for their valuable comments.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

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Further work will be done to improve the quality of the data.

1. *Adaptation* - the process by which an organism becomes better suited to its environment.

It is very important that the work of the subcommittee be carried out in a

of interest with the following one: "What is the..."

defendant all his just credits, etc., \$1,000. Attached to the declaration is the following:

*COPY OF ACCOUNT TURN ON

November 25, 1925

IN RE: C. A. WICKERSON AND SONS

| | |
|--|------------------|
| Legal fee charge, as indicated in conference, Oct 27th | \$2125.00 |
| Stenographic Services | 10.50 |
| Sheriff's fee | 3.20 |
| Recording Chattel Mortgage Release | 1.30 |
| | <u>\$2240.00</u> |

MERITS

| | | |
|------------------------|---------------|------------------|
| Costs and retainer | \$200.00 | |
| Received in settlement | <u>892.00</u> | 1092.00 |
| | BALANCE DUE | <u>\$1108.00</u> |

Defendant filed a plea of the general issue and the following affidavit of merits:

" * * * That he has a good and meritorious defense to the whole of plaintiff's statement of claim, * * * that plaintiff agreed to perform the services claimed * * * for \$600, and that the reasonable value of said services did not exceed the sum of \$600; * * * denies that he agreed to pay \$2,125 * * *; denies that there was any account stated between the parties hereto * * * for any other amount excepting said \$600 and the further sum of \$1.30 for recording chattel mortgage release; * * * denies that plaintiff expended the sum of \$10.50 or any other sum for stenographer's services for defendant or that he expended the sum of \$3.20 as Sheriff's fee for defendant; * * * states that plaintiff received a check for \$892 in settlement of the cause handled by him, which sum belonged to defendant, but plaintiff cashed the check for same and retained said sum, and has refused, and still refuses, to turn same over, or any part thereof, to defendant.

"Therefore defendant says that he * * * is not now indebted to plaintiff in the sum of \$1,108, * * * and that the only sum to which plaintiff is entitled was the sum of \$601.30, all of which has been paid to plaintiff or has been retained by him out of moneys belonging to defendant; and defendant herewith serves notice of set-off against plaintiff for the sum of \$491.40, which is the amount of money belonging to defendant and unlawfully withheld by plaintiff, and for which amount defendant asks judgment against plaintiff."

From the bill of exceptions it appears that after the return of the verdict plaintiff filed a written motion "to amend the verdict of the jury in the above entitled cause by adding after the words, 'May 15, 1929,' and before the signatures of the Jurors, the following words, 'amounting in all to \$604.07,' and to enter judgment in favor of the plaintiff against the defendant upon said verdict as amended for said sum of \$604.07 and costs;" which motion was

intentioned all his own business, and it is not to be

considered in the same way.

THE COURT OF APPEALS

February 14, 1911

IN THE COURT OF APPEALS

Appeal from the Circuit Court of the County of ...

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denied by the court. Thereupon the court entered the judgment, from which plaintiff has prosecuted this writ of error.

Plaintiff contends that "the sole question upon the record in the case is the correctness of the judgment which the Court entered, and the plaintiff has assigned as errors the action of the Court in entering judgment for only \$408, in overruling the motion of the plaintiff to amend the verdict, in not amending the verdict in accordance with the motion of the plaintiff, and in not entering judgment for the plaintiff for \$604.07;" and plaintiff insists that the judgment of the County Court should be reversed and that a judgment in his favor for the sum of \$604.07 should be entered in this court.

Plaintiff contends that "a judgment must follow and conform to the verdict in all substantial particulars, and if it is not supported by the verdict it will be irregular and erroneous." This rule is subject, of course, to numerous exceptions and qualifications. (See 33 C. J. 1173-4.) To cite a few instances: "Superfluous matter in a verdict may be disregarded; and, on the other hand, the mere addition of descriptive matter not found in the verdict is surplusage and immaterial." (Ib. 1174.) "If the specification of interest is insufficient, a judgment for the principal amount found, without interest, is supported by the verdict." (Ib. 1177.) In this state, in an action for personal injuries the plaintiff was always allowed to remit a portion of the verdict and it was then proper for the trial court to enter a judgment on the verdict for the amount awarded less the remittitur. (Libby, McNeill & Libby v. Sherman, 148 Ill. 540, 554; North Chicago Street R. R. Co. v. Tricon, 150 Ill. 532.) In passing upon the contention of plaintiff that the court erred in entering the judgment in question, it must be remembered that "it always devolves upon a party, alleging error, to make it appear.

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(Miller v. Glass, 118 Ill. 443.) Every presumption is in favor of the correctness of the judgment entered by the trial court, unless the contrary is made to appear. (Law v. Town of Home Station, 118 Ill. 304.)" (Law v. Sanitary District, 197 Ill. 523, 530. See also Reber v. Bearinger, 247 Ill. App. 294, 300, and cases cited therein.) Plaintiff has cited certain cases, such as Ehl v. Macdonald Engineering Co., 141 Ill. App. 187, wherein it was held that where an appellant fails to preserve all the evidence by bill of exceptions he will not be heard to argue that the verdict is contrary to the evidence, and that the reviewing court will presume in such a case that the evidence supported the verdict. These cases have no application to the instant question. Plaintiff strenuously contends that the judgment does not conform to the verdict and therefore the rule that every presumption is in favor of the judgment does not apply. Cases cited in support of this contention do not control the question before us. In Evans v. Sell, 36 Ky. (6 Dana) 479, a verdict was rendered in favor of the plaintiff but a judgment was entered in favor of the defendant, and the court held that as there was nothing in the record to show upon what ground judgment was rendered for the defendant they could not presume in favor of the judgment, and the judgment was reversed and the cause remanded for a new trial. Lambert v. Borden, 10 Ill. App. 648, was an action of forcible detainer brought by Borden against Rudolph Lambert and Mrs. L. Lambert to recover possession of a certain house and lot in the city of Chicago. A jury trial was had and the following verdict was rendered: "We, the jury, find the defendant guilty of unlawfully withholding possession of the premises described in the complaint in this case." Upon this verdict judgment was entered that the plaintiff recover of the defendants possession of the

premises, and that he have a writ of restitution therefor. It was held that as the verdict was against only one of the defendants it was insufficient to support a judgment against both, and as it failed to show which of the defendants was found guilty and which not guilty it was insufficient to support a judgment against either. In Lucas v. Sandler et al., 335 Ill. 274, which was an action of replevin, the jury returned the following verdict: "We, the jury, find the defendants not guilty." Upon this verdict judgment was entered that defendants "have and recover from the plaintiff possession of the automobile and their costs and charges," and it was held that "plaintiff being in possession under a writ of replevin, his right to possession remains unimpaired by the finding of the jury. It did not authorize a judgment for the return of the property, and therefore defendants could not have a writ for its return. * * * The only question is whether, under the verdict, defendants in error are entitled to a judgment for the return of the property. Clearly, on principle and authority, they are not. The word of the writ of retorne habende was therefore erroneous." In each of these cases, cited by plaintiff, the judgment was not supported by the verdict, but in the present case the judgment is supported by the verdict.

It appears to us, from the record, that the trial court treated the part of the verdict in reference to interest as surplusage. "When a jury finds not only the issues submitted to them, but embrace in their verdict the determination of matters not involved in the controversy, these redundant matters are denominated surplusage. Under these circumstances, the maxim utile per inutile non vitiatur is applicable, and such portion of the verdict as lies beyond the legitimate province of the jury may be disregarded or

rejected." (29 Am. A Mag. Mag. of Law 1000.) This principle of law has been frequently followed by the courts of our state. (See Hodge v. The People, 78 Ill. App. 370; McGee v. Railway, 49 Ill. 72; Fowler v. Paterson, 42 Ill. App. 81; Helwath v. Bell, 150 Ill. 203.) Even in criminal cases, this principle applies. (See Henderson v. The People, 148 Ill. 207, 211.) The verdict allowed interest at six per cent but the pleadings would not support a verdict for more than five per cent interest and the court had no power to change the finding of the jury in that regard. We must presume that the trial court, in treating the part of the verdict in reference to interest as surplusage, did so in the light of the pleadings and the evidence and the law, and, basing the contention of plaintiff by the record before us and the law, we feel satisfied that we would not be warranted in holding that the trial court erred in entering the judgment in question.

The judgment of the County Court of Cook County is affirmed.

APPROVED.

Barnes, P. J., and Gridley, J., concur.

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FIRST WISCONSIN NATIONAL
BANK OF MILWAUKEE,
Appellee,

v.

W. B. EDWARDS,
Appellant.

137 A
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.
257 1A. 652 3

MR. JUSTICE MCANLAN DELIVERED THE OPINION OF THE COURT.

First Wisconsin National Bank of Milwaukee, plaintiff, sued W. B. Edwards, defendant, in assumpsit. At the conclusion of defendant's evidence, upon motion of plaintiff, the court instructed the jury to find a verdict for plaintiff in the sum of \$10,564.05. Defendant has appealed from the judgment entered upon the verdict.

The declaration consists of two counts. The first alleges that defendant, as maker, executed his promissory note, on January 27, 1926, to John R. Freuler, the payee, promising to pay, in one year, the sum of \$8,750, for value received, with interest at the rate of six per cent per annum; that the note was indorsed by Freuler to plaintiff before maturity and that on January 27, 1927, it was presented to defendant for payment and payment refused. The second count consists of the common counts. Defendant filed three amended pleas. The first is a plea of non assumpsit. The second alleges, in substance, that the note was obtained from defendant through fraudulent representations of the payee, Freuler; that the consideration for the note was the purchase of certain stock of Hutchinson Film Corporation, which had been on deposit with plaintiff as collateral security for the payment of a note or notes executed by Freuler to plaintiff;

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4. *Journal of the American Medical Association*, 1997; 277: 1001-1005.

• **Intermittent** •

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• *Follow-up* and *case history*

The following examples of the use of the word "and" are given:

1. The first group, the "old guard," consists of those who have been in the service of the government for a long time and who are now being phased out. They are the ones who have been in the service of the government for a long time and who are now being phased out.

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What will I do when my time has come to rest and be needed

100-443887-100

Source: *Journal of the American Statistical Association*, 1971, 66, 123-134.

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Page 1 of 1

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that Freuler represented the stock to be of great value; that said representations were false and known by him to be false when made and were made for the purpose of deceiving defendant and inducing him to buy the stock; that defendant relied on the representations; that plaintiff knew, prior to the execution of defendant's note, that Freuler, for the purpose of deceiving and defrauding defendant, made the false statements and misrepresentations to defendant, and that plaintiff then knew that the value of the assets of said corporation was not as represented to defendant in the said statements and representations; that plaintiff knew that the stock was worthless and that Freuler's notes could not be collected and also knew that defendant was financially responsible and therefore plaintiff bought his note in place of the note or notes of Freuler, and that plaintiff parted with no additional consideration in accepting defendant's note in substitution of Freuler's note. The third plea alleges that the stock of the Film Corporation was a security under Class "D" of the Illinois Securities Law and that neither the Film Corporation nor Freuler had complied with that law, and that therefore the consideration for the note failed.

Defendant contends that "there was sufficient evidence in the record to establish every element of a cause of action in fraud and deceit against the payer of the note, John M. Freuler. A showing of defective title on the part of Freuler having thus been made, the Court erred in directing a verdict for the plaintiff." Plaintiff contends that "there is no basis in the evidence for the defense of fraud to the note here in suit." To afford relief from alleged fraud and deceit a party must show six elements:

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"(1) The misrepresentation must be in form a statement of fact; (2) it must be made for the purpose of influencing the other party to act; (3) it must be untrue; (4) the party making the statement must know or believe it to be untrue; (5) the person to whom it is made must believe and rely on the statement; and (6) the statement must be material. (Frankowski v. Knapp, 268 Ill. 183; Howliss v. Trent, 246 Id. 593; Prentiss v. Crane, 234 Id. 302; Attle & Bro. v. Sexton, 137 Id. 410.)" (Johnston v. Shackey, 335 Ill. 363, 366.) In determining the merits of the present contention it is necessary to consider only certain undisputed facts in the case. In 1925, Edward C. Carrington, Horace L. Hayward, B. B. Hutchinson and John A. Freuler organized Hutchinson Film Corporation. The stock consisted of \$750,000 par value first preferred cumulative stock, \$750,000 second preferred 8% cumulative stock and 15,000 shares of common stock of no par value. Hutchinson was made president, Freuler, vice president and Carrington, treasurer of the corporation, and these three and Hayward were made directors. Defendant and Hutchinson were neighbors and had been intimate socially, and defendant "also knew him (Hutchinson) in a business way." They were stockholders in two other companies. Defendant had been told that Hutchinson had made his money through his success in the film business. He "had confidence" in Hutchinson and considered him a man of large means. Freuler owned approximately forty per cent of the outstanding second preferred and common stock, but shortly after the organization of the company, Hutchinson, Hayward and Carrington, for some reason, became dissatisfied with his connection with it and they directed the affairs of the corporation without consulting him and gave him no opportunity to attend meetings of the directors. In July or August, 1925,

(2) The investigation was in fact a search for

(3) It must be noted that the purpose of the investigation was

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Hutchinson went to California to supervise the production of the corporation's first picture, which was being made under a contract with Associated Exhibitors, and in the fall of that year he completed the production of this picture and brought it to Chicago, where a private exhibition of it was given, at which a number of people, including defendant, were present. Freuler was not invited to this exhibition although he had requested to see the picture. Carrington, Hayward, Hutchinson and defendant were all very much pleased with the picture and thought that it would be a great success. In January, 1936, Hutchinson returned from New York with a check for \$36,000, which was an advance payment on the picture made by Associated Exhibitors under the contract. About this time Hutchinson proposed to defendant that the latter purchase some of the first preferred stock of the Film Corporation. Defendant then held several conversations with Hutchinson, Hayward and Carrington in reference to this matter. They told defendant that they expected the Film Corporation to make a profit of \$400,000 within a year upon the four pictures which the corporation had contracted to produce for the Associated Exhibitors, and that they expected to sell only \$100,000 worth of the first preferred stock and that if defendant bought some of that stock he could pay for it by his note which they would discount at the bank and that he would never have to pay the note because the first preferred stock would be retired out of the first profits of the company, and the note would be taken care of when this stock was retired. Hutchinson, Carrington, Hayward and defendant were all "enthused" over the first picture and the prospects of the company. Defendant stated: "The picture was a wonderful production." Hutchinson showed defendant the \$36,000 check and the latter thought that the company "ought to be able to pay \$100,000" and he "believed there was a fair chance" to retire the \$100,000 preferred stock out

of the first profits, and he "believed he (Hutchinson) could make good pictures, which were salable and out of which the company would make a profit." Defendant testified: "I thought they (Hutchinson, Carrington and Hayward) knew enough about their business I could safely come in." He therefore bought 250 shares of the first preferred stock of the corporation at 70 and gave to the corporation his note for \$17,500 in payment thereof, which he later paid. Freuler had nothing to do with this transaction, and until the conference in the Congress hotel, hereafter referred to, defendant had never had any dealings with Freuler in reference to Film Corporation or any business matter. About the time defendant bought the said stock he was told by Haywards and Hutchinson that "Freuler's connection with the company was objectionable to the bank from whom they were getting their money" and that because of this attitude of the bank Freuler's stock should be purchased and he should be eliminated from the company. Defendant testified that "the four of them had the talk about getting rid of Mr. Freuler." After a full discussion of the matter, defendant believed that the Film Corporation was a very valuable property and Carrington, Hutchinson, Hayward and defendant came to an agreement that Freuler's stock in the company should be purchased by them for \$40,000, and they further agreed to obligate themselves to pay \$40,000 for the stock. Defendant testified: "I was willing to go in with the other four men at whatever they might pay, they knowing more about it than I did." Defendant was told by his associates that Freuler was to be "removed out of the company" if his stock was purchased, and he assumed from the representations made to him by them that he "would make money on the stock." As defendant testified, Hutchinson, Hayward and Carrington "had me enthused." It appears to be undisputed that prior to the meeting at the Congress hotel, hereafter referred to, defend-

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ant told Hayward not to let Freuler see the picture for if he saw it they would be unable to buy his stock. The testimony of one of the witnesses that "it was his (defendant's) idea of buying out Freuler and getting him out of the picture," was not denied by defendant. On January 26, 1936, Hayward, Hutchinson, Carrington, defendant and Freuler had a meeting at the Congress hotel, which was brought about by Carrington. The plain purpose of the meeting was to "eliminate" Freuler from the company. The latter, apparently, had not contemplated selling his stock and had made no proposition of any kind to anyone in reference to a sale of the same. When he came to the meeting he was entirely unaware of the scheme of defendant and his associates. The meeting was presided over by Carrington, who did most of the talking, according to defendant. Carrington told Freuler that the Chicago bank with which they were doing business had no confidence in him and that it "would not deal with the company as long as Freuler was connected with it, and therefore it was necessary some arrangement be made about his stock." Freuler resented this statement. According to defendant, Carrington also stated that the principal asset of the film company was Hutchinson "and his ability to make pictures;" that Freuler was "dangerous to the credit of the company;" that he would have to relinquish his position as a director and that they would purchase his stock if they could get it at a price which they were willing to pay. According to one of the witnesses, it was defendant who suggested at the meeting the "idea of having Mr. Freuler out." Defendant testified that "Colonel Carrington and Freuler became quite heated between each other during the conversation." The proposition to buy his stock was a complete surprise to Freuler and he "was indignant." He at first refused to consider selling his stock but finally he and Carrington "commenced to talk price and assets." Freuler insisted

that his stock was worth \$100,000. Carrington said that they would not give more than \$40,000 for it and a lengthy discussion took place as to the value of the stock and assets of The Film Corporation. Freuler's stock was then in the hands of plaintiff bank as collateral for a loan and he stated "that he could make no deal at any price without the permission of the First Wisconsin National Bank," and when the meeting finally broke up "the only understanding was that he would ask his bank whether he could make the deal or not. That was the way the meeting was left." Defendant testified, Freuler "didn't agree to anything." Soon afterwards, Freuler called Carrington by telephone and advised him that plaintiff bank would require one-third in cash before it would release the stock. Subsequently, negotiations were continued between Carrington, representing the four parties, and Freuler, and the latter finally agreed, two months later, to sell his stock for \$40,000 to Carrington, Hayward, Hutchinson and defendant. A written memorandum of purchase was then drafted by Carrington and signed by the four and Freuler. By the terms of this instrument defendant, Hutchinson, Hayward and Carrington agreed to buy Freuler's second preferred and common stock for \$40,000, \$6,000 to be paid in cash, and \$35,000 to be represented by notes of the parties with interest at six per cent, to be paid on or before July 27, 1927. The stock was to be divided "into four equal parts and Edwards, Hutchinson, Hayward and Carrington are to deliver to said Freuler their promissory notes in the amount of \$8,750.00 payable on or before January 27, 1927 with 6% interest and said stock after having been divided into four equal parts to be attached thereto as collateral as security for the payment of said four notes." Carrington, acting for his associates, then procured from each of the other three a check for \$1,250 and a note for \$8,750, which, together with his own note and check for like amounts, he forwarded to plaintiff with written

instructions to substitute the notes as collateral for Freuler's loan and to apply the checks in reduction of the Freuler loan and to attach to the note of each of the four one-fourth of the stock purchased from Freuler. At that time plaintiff held a note of Freuler's for \$78,400 and held, as collateral to the note, all his shares in the Film Corporation. After the receipt of the letter of Carrington inclosing the notes and checks plaintiff bank attached to the note of defendant 812 shares second preferred stock and 988 shares no par common stock of Hutchinson Film Corporation in accordance with the instructions. The bank also attached to the note of each of the other three one-fourth of the stock purchased from Freuler. The second picture of Film Corporation proved a failure and the corporation lost all of the money it had put into it. Associated exhibitors went out of business without paying a note for \$18,000 which it had given Film Corporation. Film Corporation was unable to sell the first or second pictures and was forced to close down and thereafter it went into the hands of a receiver. The receiver sold California land belonging to the corporation for \$50,000 and the other assets for \$3,000. This suit arose out of the note of defendant that was substituted as collateral for Freuler's loan. The indorsement of the latter upon the back of the note was made about the time the bank received the note. Then the note was presented to defendant, on January 27, 1937, he refused to pay it.

In support of his contention defendant argues that representations of material existing facts were made by Freuler at the Congress hotel meeting, that these representations were false and known by Freuler to be false, and that defendant believed and relied on these representations when he purchased the stock. In support of this argument defendant refers to certain statements that defendant testified were made by Freuler at this meeting. It is a

sufficient answer to the present contention to say that the undisputed evidence in the case shows beyond a reasonable doubt that before this meeting took place Carrington, Hayward, Hutchinson and defendant had definitely agreed among themselves to purchase Freuler's stock for \$40,000 and to eliminate the latter from the company. The Congress hotel meeting was apparently planned in furtherance of the agreement. The statements there made by Carrington and his associates that the stock and assets were of low value were not made in good faith, and were designed solely to induce Freuler to sell his stock to them at their price, and defendant, who now complains that Freuler there made false statements as to values, acted by and permitted repeated statements as to values to be made to Freuler, which defendant then believed were false and which he knew were made as part of a scheme to force Freuler to sell his stock at an unfair price. The statements there made by Freuler to the effect that the stock and assets possessed a higher value than defendant's associates claimed, had no influence whatever in inducing defendant to buy the stock, and they were not made by Freuler for the purpose of inducing defendant to buy the stock. On the contrary, Freuler was not trying to sell his stock. It is settled law that to secure redress for false representations a plaintiff must show that he would not have acted but for such representations, that the false representations operated on his mind as an influence to enter into the contract and that but for such influence he would have acted differently. Defendant was already a stockholder in the company, his associates controlled it, and two months elapsed after the Congress hotel meeting before defendant and his associates finally succeeded in obtaining the stock from Freuler. Defendant appears to place great reliance upon the fact that he testified

that he believed certain statements as to values made by Freuler at the meeting. Defendant testified that he did not believe that they were paying more than Freuler's stock was worth and that his belief "was based on my knowledge and observations and conversations with Hutchinson and Hayward and Carrington, plus my conversations with Freuler," and defendant here relied entirely upon alleged statements made by Freuler at the Congress Hotel meeting. His mere statement, upon the trial, that he believed what Freuler there said as to values to be true and that he relied upon them, can have no probative weight in view of his acts and conduct in relation to the purchase of the stock, as shown by his own admissions and by undisputed evidence. Moreover, mere belief in the truth of statements is not sufficient; in addition, it must appear that the hearer acted upon such belief, and defendant admitted that before he attended the meeting he had agreed to participate in the purchase of the stock for the very figure at which it was finally purchased. In fact, he testified that he "was willing to go in with the other four men at whatever they might pay." It is undisputed in the evidence that Freuler did not know at the time of the meeting that defendant then owned any stock in the company and that the first time he was informed that defendant was interested in the purchase of his stock was when the deal was closed, two months after the meeting. Freuler testified that while he considered his stock worth a great deal more than \$40,000, he finally concluded to sell it at that price because he was satisfied that Carrington and his associates had determined to "freeze me out." Under the undisputed facts it is idle to argue that anything Freuler said at the meeting as to values had the slightest influence in inducing defendant to purchase the stock. The present contention is an afterthought, born of the unexpected failure of Film Corporation, and it is without the slightest merit. The argument that Carrington,

Hayward and Hutchinscon conspired with Freuler to induce defendant to purchase the stock by fraudulent representations has no foundation in the evidence. It is very clear, however, that defendant and his associates planned to force Freuler to sell them his stock at their own price and to eliminate him from any connection with the company.

Defendant contends that the court excluded competent evidence that tended to establish fraud on the part of Freuler. It is a sufficient answer to this contention to say that none of this evidence, even if it were competent, would tend to establish that Freuler, at the Congress hotel meeting, made representations with intent to deceive defendant and that the latter relied upon these representations when he made the purchase of the stock and would not have made the purchase had it not been for the said representations.

After a very careful consideration of the record, we are satisfied that there is not the slightest merit in this appeal. The judgment of the Circuit Court of Cook County is a just one and it should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

Further work is required to develop more rigorous methods for identifying

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THE UNITED STATES DEPARTMENT OF AGRICULTURE

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THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. ALEX KIEFERSTEIN,
Appellant,

v.

FRED V. MAGUIRE, HARRY A. LIPSKY and
FRANK W. BARBER, constituting the
BOARD OF ELECTION COMMISSIONERS OF
THE CITY OF CHICAGO, etc., EDMUND K.
JANECKI, County Judge, Chairman,
SAMUEL A. ETTELSON, Corporation Counsel
of Chicago, FRED V. MAGUIRE, HARRY A.
LIPSKY and FRANK W. BARBER, Election
Commissioners, constituting the
CANVASSING BOARD OF THE CITY OF
CHICAGO, etc., ROBERT M. FREITAG,
County Clerk, BERTHOLD A. GROMSON, REUBEN
E. HELFER, FRANK AINS MARSHALL and GEORGE
W. PRINCE,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE MCANLAN DELIVERED THE OPINION OF THE COURT.

The relator, Alex Kieferstein, was a candidate for
alderman in the Fourth Ward of the City of Chicago at the
aldermanic election held February 26, 1929, under the so-called
Non-partisan Election Act. The court sustained general and
special demurrers to his petition for a writ of mandamus and
entered an order dismissing the petition. The relator has
appealed.

The amended petition alleges that at the said aldermanic
election the relator, Berthold A. Gromson, Reuben E. Helfer, Frank
Ains Marshall and George W. Prince were the only candidates for
alderman in the Fourth Ward; that at the close of the polls, the
judges and clerks of election in each precinct of the ward
canvassed the votes cast in their respective precincts, made
proclamation of the result of such canvass and made due return

thereof, pursuant to law; that thereafter the Canvassing Board of Chicago duly opened the returns made by the judges and clerks of election as aforesaid, tabulated the returns and canvassed the same, ascertained the results of said election, and entered of record its findings setting forth that upon a complete canvass of said precinct returns it appeared that a total of 15,284 voters in said ward voted at said election, that is to say, the total number of votes cast for alderman in said ward at said aldermanic election was 15,284 votes, and that of this total number of votes cast the relator received 4,754 votes, Cronson, 7,518 votes, Helfer, 90 votes, Marshall, 93 votes and Prince, 2,392 votes, leaving a balance of 337 votes for alderman cast but not counted for any candidate. The relator further alleges that none of the candidates received a majority of the votes cast for alderman in said count at said election and that therefore a supplementary election was necessary. The relator further alleges that said Canvassing Board, after finishing the said canvass, made a purported abstract or statement of the canvass of the votes "and the County Court of Cook County thereupon entered of record such purported abstract, and a certified copy of such record was thereupon filed with the county clerk of said county;" that the said abstract is incomplete in that it fails to show the total number of votes cast for alderman at said election and shows only the total number of votes cast for Cronson, the relator, Helfer, Marshall and Prince, "thereby making it to appear that the said Berthold A. Cronson received the majority of votes cast for alderman in said Fourth Ward at said general election for alderman held on the 26th day of February, A. D. 1929, whereas no candidate received such majority, * * * and the relator avers that by reason of the premises no person was elected alderman in the said Fourth Ward at the said election, and therefore a supplemental election in the said ward must

be held on the 2d day of April, 1929, * * * pursuant to statute." Petitioner prayed (inter alia) "that the Board of Election Commissioners shall provide for the holding of a supplementary election for alderman in the Fourth Ward of the City of Chicago on the 2d day of April, A. D. 1929, under the provisions of the Non-Partisan Election Act, or that said board of election commissioners shall after April 2, 1929, on a day to be fixed by the court, provide for the holding of a supplementary or special election for alderman in said Fourth Ward of the City of Chicago under the provisions of the said Non-Partisan Aldermanic Act."

The respondents have raised a number of contentions in support of their argument that the order of the Superior Court must be affirmed. In our judgment it is only necessary to refer to one. The respondents contend that "the right sought to be enforced by the petitioner has become a mere abstract right," that the time fixed by the statute for holding the supplementary election has long since passed and that the writ of mandamus will not be issued in any case where it will prove unavailing, fruitless or nugatory. The act provides:

"Sec. 302.) Times for election. § 5. General elections for aldermen shall be held in the year or years fixed by law for holding the same, on the last Tuesday of February of such year. Any supplementary election for aldermen held under the provisions of this Act shall be held on the first Tuesday of April next following the holding of such general aldermanic election. Special aldermanic elections shall be held on the date provided for by the ordinance calling the same, and if followed by a supplementary election, such supplementary election shall be held four weeks thereafter. * * * (Chall's Ill. Rev. St., Ch. 24, (1929) p. 373.)

The sole object of the relator's petition is to bring about a supplementary election for alderman and it is plain from the above paragraph of the statute that the only supplementary election that could be held under the act had to be held on April 2, 1929. The order sustaining the general and special demurrers and dismissing

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was transferred to the custody of the FBI and held in custody.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950, and this increase has been largely due to the growth of the urban population. The urban population has increased from about 50 million in 1900 to over 150 million in 1950, and this increase has been largely due to the growth of the urban population. The urban population has increased from about 50 million in 1900 to over 150 million in 1950, and this increase has been largely due to the growth of the urban population.

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* For significant results, $p < 0.05$ are indicated.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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THE UNIVERSITY OF CHICAGO PRESS

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1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know how well the study was conducted and whether the results are reliable and valid. They also want to know how the study was funded and whether there were any conflicts of interest.

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THE STATE OF TEXAS, COUNTY OF DALLAS, ss. I, _____, Clerk of the County Court, do hereby certify that the foregoing is a true and correct copy of the original of the same as the same appears from the records of the County Court of the County of Dallas, State of Texas.

... ..

1947-1948

* 1994-95: 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845

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which has a strong influence on the economy and the environment.

the petition was not entered until October 4, 1929. No useful purpose could have been served by the issuance of the writ. "The rule has long been recognized in this court that the writ of habeas corpus will not be issued in any case where it will prove unavailing, fruitless or nugatory; that the court will not compel the doing of a vain and useless thing." (The People v. City of Evanston, 233 Ill. 273, 274.) The exact question raised by the instant contention of the respondents was before the court in The People ex rel. Scribner v. Jarecki, 247 Ill. App. 228, and The People ex rel. Barber v. Jarecki, ib. 215, and the ruling in each of these cases sustains the instant contention of the respondents.

The judgment of the Superior Court of Cook County will be affirmed.

-PINKS.

Barnes, P. J., and Gridley, J., concur.

The position was not altered until October 1, 1914. The matter
 before the court was then presented by the counsel of the state.

With this case, however, in 1914, the court was not
 presented with the question of the validity of the law.

Accordingly, the court in 1914 was not asked to
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 question of the validity of the law.

34061

E. H. ROBINSON, doing business
as ROBINSON MOTOR SALES,
Appellee,

v.

W. C. HANDLEY,
Appellant.

APPEAL FROM SUPERIOR
COURT, CLATSOP COUNTY.

257 I.A. 653¹

MR. JUSTICE HOSMAN DELIVERED THE OPINION OF THE COURT.

E. H. Robinson, doing business as Robinson Motor Sales, plaintiff, sued W. C. Handley, defendant, in an action in assumpsit and recovered a verdict of \$2,848. Judgment was entered upon the verdict and this appeal followed.

Defendant contends that "the verdict is contrary to the manifest weight of the evidence." After a careful consideration of the evidence, we have reached the conclusion that this contention is without merit.

Defendant next contends that two instructions given on behalf of plaintiff incorrectly presented the law to the jury. Number four, defendant claims, was erroneous because it ignored defenses set up by defendant and upon which evidence had been introduced. It has been held that a plaintiff is obliged to present only the law applicable to his theory of the case, and he is not bound, in every instruction, to anticipate and exclude every possible defense. (See Mt. Olive & Staunton Coal Co. v. Rademacher, 100 Ill. 536; Kellyville Coal Co. v. Strick, 317 Ill. 516, 535.) Under this rule instruction number four was a proper one. Moreover, the instruction did not ignore the antagonistic theory of defendant, but hypothetically negated it.

Given instruction number five, complained of, reads as follows:

"The court instructs the jury, as a matter of law, that in this case the jury has a right to weigh and examine the evidence closely and carefully in the light of a common knowledge and experience of mankind, and you have a right to take into consideration the common knowledge and experience of mankind and the course of the laws of nature in determining whether the evidence is reasonable or unreasonable or probable or improbable, and in determining what weight it is entitled to receive."

This instruction is a general one and it does not attempt to single out the evidence of any particular side, and we are unable to see how it could have possibly prejudiced the rights of defendant.

Defendant's next, and last, contention is that "the trial Court erred in the admission of evidence for the purpose of impeachment of the defendant." It is somewhat difficult to follow the defendant's argument in support of this contention, but we will endeavor to do so. When defendant was called as a witness in his own behalf, on direct examination, he testified that plaintiff sold him his paper under a plan which was commonly called the "Hendley Plan," which was different from any other plan of financing known at that time; that during the period that he dealt with plaintiff he was also purchasing notes of many other automobile dealers on the "Hendley Plan," and that there was a reserve charge made against all of these dealers and that this reserve charge was accumulated into a fund and none of it was ever returned to any of the dealers. The evident object of this testimony was to strengthen his previous testimony as to his dealings with plaintiff and to justify his conduct in reference thereto. On cross-examination the following occurred: "Q. Did you ever hear of Dan Agon? A. Yes. Q. Did you ever pay him any money back as a matter of reserve? A. No, not on reserve. * * * Mr. Burke: Q. I say, what did you pay it back on? A. I don't remember. Q. Did he sue you? A. Yes. Q. For reserve? A. Yes. Q. You settled and paid him, didn't you? A. No. Q. Well, did you win that case? Mr. Bursitt (attorney for defendant): Now, if your Honor please, I object to further cross-examination of the witness, whose credibility he vouches for, and he can't impeach him by cross-examination or otherwise. Mr. Burke: You mean I called this witness. Mr. Bursitt: Absolutely. And I am perfectly willing to show your Honor the law;

[illegible]

There is no one in the world who is not a member of the Church of Jesus Christ of Latter-day Saints.

[illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

any all of these evidence and more serious things are anticipated
back on the "Security Council" and that there was a "Security Council" was
in this situation he was also prepared to be very close to the

be the business with respect to the property in question
and with respect to the property in question. The
fact that the property is in the hands of the
trustee and not in the hands of the settlor is
not a bar to the trustee's duty to account for
the property in the hands of the trustee.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. The Government of the United States of America, hereinafter referred to as the "Government",

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

100-443887-100

you can't impeach this witness; you vouched for him in this Court." The court sustained the objection to the last question. The following then occurred: "Mr. Berke: As a result of that lawsuit, did you pay any money to Mr. Dan Agoa? * * * The Witness: I don't recall having made any such payment." Agoa, an automobile dealer, was called as a witness on behalf of plaintiff and stated that he had a contract with defendant. He was then asked whether he had ever received any money or property from defendant, but the court sustained an objection to this question on the ground that it was an attempt to impeach defendant and that this was improper, for the reason that defendant had previously been called as a witness by plaintiff and that plaintiff could not impeach his own witness. Defendant contends that because plaintiff had previously called defendant as a witness he thereby vouched for his credibility and that plaintiff had no right to impeach the testimony of defendant even when that testimony was given by defendant when he was called as a witness in his own behalf. It appears that plaintiff called defendant as a witness and attempted to interrogate him in reference to certain exhibits, but defendant stated that he was not familiar with them and referred the examiner to his bookkeeper, Puls, who, he stated, would be able to testify fully as to the exhibits. The court erred in ruling that because plaintiff called defendant as a witness that the latter might thereafter go upon the stand in his own behalf and that plaintiff would be bound by any testimony that he might then give and would not have the right to impeach any of said testimony. Defendant concedes that the court prevented Agoa from testifying to facts that might tend to contradict defendant, but he argues that the mere calling of Agoa as a witness and asking him the questions referred to created a prejudice against defendant

in the minds of the jurors. We find no merit in this contention. Defendant, to impress the jury with the fairness of his defense, had testified, on direct examination, that he dealt with many other dealers and always in the same way as he did with plaintiff, and in our judgment he could not justly complain if the trial court had allowed plaintiff to introduce evidence to contradict him in this respect. However, as the court ruled in defendant's favor, he is in no position to complain.

After a careful consideration of the three contentions raised by defendant, we are satisfied that he has had a fair and impartial trial, and the judgment of the Superior Court of Cook County should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

in the nature of the property. The fact is that in this connection
unpleasant, in respect to the fact that the property of his father,
of property, on direct communication, and he has many
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of the same property, and the property of the same property.

There is a direct communication of the same property

14095

FRANK J. ALLEN, doing business
as Frank J. Allen & Company,
Appellee.

v.

E. J. HITKEY and LEONARD T. HITKEY,
Appellants.

APPEAL FROM SUPERIOR
COURT, JACK COUNTY.

257 I.A. 653

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Frank J. Allen, doing business as Frank J. Allen & Company, plaintiff, obtained a judgment by confession for \$2,363 against E. J. Hitkey and Leonard T. Hitkey, defendants, on two promissory notes. Thereafter, upon motion of defendants, the judgment was opened and they were granted leave to plead to the declaration upon the merits, "said judgment stand as security until the merits of this cause be heard and determined." Thereafter defendants filed a plea of the general issue and gave notice of a special matter of defense, coercion and duress. The case was tried before the court, with a jury, and there was a verdict returned finding the issues for plaintiff and assessing his damages at the sum of \$2,000. A motion by defendants for a new trial was overruled and on October 29, 1929, the following judgment was entered: "Therefore it is considered by the court that the judgment heretofore rendered on the 31 day of May A. D. 1929 for \$2,363 to stand in full force and effect as of the date of the rendition thereof and the plaintiff have execution," etc. This appeal followed.

Defendants contend "the notes in suit were signed under duress." Defendant E. J. Hitkey was the sole witness for defendants as to the alleged duress and plaintiff denied, in toto, his testimony

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5271A.658

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THE UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.
JULY 1, 1954
MEMORANDUM FOR THE ATTORNEY GENERAL
SUBJECT: [Illegible]
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in that regard. Plaintiff strenuously contends that the alleged facts in support of the claim of duress do not amount to duress in law, and while we think there is much force in this contention we do not consider it necessary to pass upon the same for the reason that it is apparent that the jury did not believe the testimony of said defendant in reference to the alleged duress.

Defendants next contend that the court erred in sustaining objections of plaintiff to certain questions asked plaintiff on cross-examination. We have carefully considered this contention and find it without the slightest merit.

Defendants next contend that the court erred in entering a judgment, after verdict, confirming in toto the judgment entered by confession. Where a defendant has been let in to plead, upon the opening of a judgment by confession, the burden rests upon plaintiff to prove his case, the same as if there had been no judgment by confession. (Cohen v. Rosenthal, 337 Ill. App. 331; Morris v. Taylor, 170 Ill. App. 303; Borchsenius v. Samelson, 100 Ill. 82.) This rule of law is so well established that it is unnecessary to refer to the many other cases that might be cited in support of it. Under the plea of the general issue defendants might establish a defense to the whole or a part of plaintiff's claim. Where the finding of the jury is for an amount less than that fixed in the judgment by confession, it is the duty of the court to reduce the amount of the judgment to the amount fixed in the verdict of the jury. (See Lally v. Lally, 167 Ill. 488, 488-9; Bradshaw v. Hansen, 232 Ill. App. 44, 51; Amundson v. Ryan, 111 Ill. 306, 311.) A court of law has power to open the judgment rendered upon a confession and hear the parties, and then, if the verdict shall require it, reduce the amount of the judgment or set it aside altogether. (Fleming v. Janek, 82 Ill. 476, 478; McGuire v. Campbell, 58 Ill. App. 189.) Where, after

a judgment by confession, the defendant makes a showing that the amount of the judgment entered against him was unjust, the court should allow him to plead, the judgment to stand as security, and the issue as to whether the amount fixed in the judgment by confession was in fact due the plaintiff from the defendant should be submitted to a jury. (Lanyon v. Lams, Owen & Co., 41 Ill. App. 634.) Courts of law exercise equitable jurisdiction over judgments entered by confession, and they have the right to make such orders as will protect the interests of the plaintiff and the defendant. Plaintiff argues that the jury have found the issues for plaintiff and that regardless of the amount fixed in the verdict it was the duty of the court to confirm the judgment entered by confession and for the amount therein fixed, and cites in support of his argument, Cervenka v. Hunter, 183 Ill. App. 347; Morris v. Taylor, *supra*, and West v. McNaughton, 211 Ill. App. 230. In none of the opinions in these cases is the amount of the verdict stated and in each case there was an order entered, after verdict, confirming the judgment by confession, which action of the trial court was affirmed. We have examined the records in these cases and we find that in each the verdict of the jury was for the same amount as that allowed in the judgment by confession, and therefore the judgment entered after verdict was a proper one. In the instant case the jury found that there was due plaintiff only \$48,000 and plaintiff made no motion for a new trial. After verdict the trial court should have entered a judgment reducing the amount of the judgment by confession to the extent of \$365.

The judgment order of the Superior Court of October 29, 1929, in so far as it confirms the judgment by confession entered May 31, 1929, is reversed, and the cause is remanded with directions to the trial court to enter a judgment order reducing the judgment

order of May 31, 1929, to the extent of \$663 and conforming it
for \$2,000.

JUDGMENT ORDER OF OCTOBER 29, 1929,
REVERSING, AND CAUSE REMANDED WITH
DIRECTIONS.

Barnes, T. J., and Gridley, J., concur.

It is a very old and well known fact that the
people of the world are not all of the same
color.

There are many different colors of people.

Some are white, some are black, some are
brown, some are yellow, some are red.

And some are of other colors.

But all of them are people, and all of them
are of the same color.

147
14329

CENTRAL LIFE INSURANCE COMPANY
OF ILLINOIS, a corporation,
Appellee,

v.

SIDNEY MASTERLIK et al.,
Defendants,

J. K. HARRIS, individually and as
trustee, and HAROLD L. WEIGENHOLTZ,
Appellants.

INTERLOCUTORY

APPEAL FROM INTERLOCUTORY
ORDER OF SUPERIOR COURT
OF COOK COUNTY, DENYING
MOTION TO DISOLVE
INTERLOCUTORY INJUNCTION.

257 I.A. 653

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On January 31, 1930, the Superior Court of Cook County entered an interlocutory injunction in this case. No appeal was taken from this order by any of the defendants, but on February 24, 1930, defendants J. K. Harris, individually and as trustee, and Harold L. Weigenholtz filed a written motion to dissolve the said injunction, and thereafter the chancellor entered an order denying the motion. The said defendants have appealed from this order.

The bill seeks to foreclose a trust deed dated June 1, 1928, executed by Sidney Masterlik and Alice M. Masterlik, conveying certain premises, to secure the payment of their notes aggregating \$46,500. The bill also seeks to have set aside, as a fraudulent conveyance, a chattel mortgage upon certain furniture and furnishings in the premises in question and to have such furniture and furnishings decreed to be converted into and to be a portion of the premises in question, and to have a sale of such furniture and furnishings made as part and parcel of the realty. The injunctive order restrains certain of the defendants, including appellants, from foreclosing

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THE UNIVERSITY OF CHICAGO PRESS
530 N. Dearborn St., Chicago, IL 60610
U.S.A. and Canada
0022-2967(199809)50:3;1-
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850 .A.1752

On June 15, 1964, the following information was received from the Bureau of the Census, Washington, D.C.:

THE UNIVERSITY OF CHICAGO PRESS

[illegible]

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
155 E. 42ND STREET
NEW YORK 17, N.Y.

the chattel mortgage on the furniture and furnishings in the premises and from transferring, removing, selling, pledging or changing the condition of any of the said furniture and furnishings until the further order of the court. Appellant Harris, as trustee, is the mortgagee named in the chattel mortgage, and appellant Feigenbalt is the holder of the notes secured by the same.

The injunctive order contains the following. "That said injunction may be issued without notice for good cause heretofore shown in the allegations of this bill of complaint, and that said injunction issue forthwith without the necessity of complainant first giving bond therewith." The statute provides that a complainant's bond can be dispensed with "when for good cause shown, and upon notice and full hearing the court, judge or master is of the opinion that the injunction ought to be granted without bond." Appellants state that "nowhere in the bill of complaint does there appear any averment warranting the waiver of a complainant's bond. The injunctive order contains no recital or finding of any fact which would serve to relieve the complainant of the necessity of complying with the statutory requirement of furnishing a proper bond as a condition to the issuance of the writ of injunction. Nor does the injunctive order recite that the chancellor was of the opinion that good cause was shown for waiving the filing of a complainant's bond," and they contend that the issuance of the interlocutory injunction without bond, under such a state of the record, constitutes reversible error. Had appellants appealed from the injunctive order there would have been merit in their contention, but they did not see fit to do so, and filed a written motion "to dissolve the temporary injunction heretofore issued herein against said defendants, for insufficiency of the bill of complaint herein appearing and amendment thereto as to said defendants; said insufficiency /

from the face of said bill of complaint and amendment thereto." The chancellor denied this motion and entered an order to that effect, and it is from that order that appellants have appealed. Having been fit in the lower court to base their motion upon a single ground, they will not be allowed in this court to urge other grounds in support of their contention that the chancellor erred in his ruling upon their motion.

Appellants next contend that "the bill of complaint contains no prayer for the injunctive relief allowed by the order of injunction," and that "the writ of injunction may not issue unless a specific prayer therefor appears in the prayer for relief as well as in the prayer for process." This contention appears to have been abandoned in the reply brief of appellants. In any event, there is no merit in it, as the prayer for injunctive relief is sufficient to warrant the injunctive order.

Appellants admit, however, that their principal contention is "the lack of any equitable right on the part of the complainant in the personality affected by the receivership and by the injunctive order." "The motion to dissolve having been based on a want of equity apparent on the face of the bill it had the same effect as a demurrer, and the facts stated in the bill are to be taken as true. (Bennett v. McFadden, 41 Ill. 334.) Conclusions of the pleader were not admitted by the motion, but only facts which were well pleaded." (White v. Young Men's Christian Ass'n, 233 Ill. 526, 528.)

The bill alleges that complainant, on December 1, 1927, sold and conveyed the premises in question to the Masterlike, taking back a purchase money mortgage on the premises for \$47,000; that on June 1, 1928, the Masterlike prevailed upon complainant to cause the trust deed dated December 1, 1927, to be released "and the notes thereby described cancelled and surrendered, and did then and there

Approved: _____ Date: _____

1. The following is a list of the names of the persons who were present at the meeting held on the 1st day of January, 1900, at the residence of the undersigned, at the corner of the 1st and 2nd streets, in the city of New York, for the purpose of organizing a new and independent order of the Knights of the Ku Klux Klan, in the city of New York, and for the purpose of electing officers and members of the same.

[illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed changes to the law of the United Kingdom regarding the treatment of the British Commonwealth countries.

1900-1901

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While a specific project location appears in the report, the value

as well as the proper for process.

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100-443887-100

... ..

PERSONAL LEADERSHIP CLASS - 1960-1961

1. The Board of Directors shall have the authority to:

100-443887-100

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2014-2015-2016-2017-2018-2019-2020-2021-2022-2023-2024-2025-2026-2027-2028-2029-2030-2031-2032-2033-2034-2035-2036-2037-2038-2039-2040-2041-2042-2043-2044-2045-2046-2047-2048-2049-2050-2051-2052-2053-2054-2055-2056-2057-2058-2059-2060-2061-2062-2063-2064-2065-2066-2067-2068-2069-2070-2071-2072-2073-2074-2075-2076-2077-2078-2079-2080-2081-2082-2083-2084-2085-2086-2087-2088-2089-2090-2091-2092-2093-2094-2095-2096-2097-2098-2099-2100-2101-2102-2103-2104-2105-2106-2107-2108-2109-2110-2111-2112-2113-2114-2115-2116-2117-2118-2119-2120-2121-2122-2123-2124-2125-2126-2127-2128-2129-2130-2131-2132-2133-2134-2135-2136-2137-2138-2139-2140-2141-2142-2143-2144-2145-2146-2147-2148-2149-2150-2151-2152-2153-2154-2155-2156-2157-2158-2159-2160-2161-2162-2163-2164-2165-2166-2167-2168-2169-2170-2171-2172-2173-2174-2175-2176-2177-2178-2179-2180-2181-2182-2183-2184-2185-2186-2187-2188-2189-2190-2191-2192-2193-2194-2195-2196-2197-2198-2199-2200-2201-2202-2203-2204-2205-2206-2207-2208-2209-2210-2211-2212-2213-2214-2215-2216-2217-2218-2219-2220-2221-2222-2223-2224-2225-2226-2227-2228-2229-2230-2231-2232-2233-2234-2235-2236-2237-2238-2239-2240-2241-2242-2243-2244-2245-2246-2247-2248-2249-2250-2251-2252-2253-2254-2255-2256-2257-2258-2259-2260-2261-2262-2263-2264-2265-2266-2267-2268-2269-2270-2271-2272-2273-2274-2275-2276-2277-2278-2279-2280-2281-2282-2283-2284-2285-2286-2287-2288-2289-2290-2291-2292-2293-2294-2295-2296-2297-2298-2299-2300-2301-2302-2303-2304-2305-2306-2307-2308-2309-2310-2311-2312-2313-2314-2315-2316-2317-2318-2319-2320-2321-2322-2323-2324-2325-2326-2327-2328-2329-2330-2331-2332-2333-2334-2335-2336-2337-2338-2339-2340-2341-2342-2343-2344-2345-2346-2347-2348-2349-2350-2351-2352-2353-2354-2355-2356-2357-2358-2359-2360-2361-2362-2363-2364-2365-2366-2367-2368-2369-2370-2371-2372-2373-2374-2375-2376-2377-2378-2379-2380-2381-2382-2383-2384-2385-2386-2387-2388-2389-2390-2391-2392-2393-2394-2395-2396-2397-2398-2399-2400-2401-2402-2403-2404-2405-2406-2407-2408-2409-2410-2411-2412-2413-2414-2415-2416-2417-2418-2419-2420-2421-2422-2423-2424-2425-2426-2427-2428-2429-2430-2431-2432-2433-2434-2435-2436-2437-2438-2439-2440-2441-2442-2443-2444-2445-2446-2447-2448-2449-2450-2451-2452-2453-2454-2455-2456-2457-2458-2459-2460-2461-2462-2463-2464-2465-2466-2467-2468-2469-2470-2471-2472-2473-2474-2475-2476-2477-2478-2479-2480-2481-2482-2483-2484-2485-2486-2487-2488-2489-2490-2491-2492-2493-2494-2495-2496-2497-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513-2514-2515-2516-2517-2518-2519-2520-2521-2522-2523-2524-2525-2526-2527-2528-2529-2530-2531-2532-2533-2534-2535-2536-2537-2538-2539-2540-2541-2542-2543-2544-2545-2546-2547-2548-2549-2550-2551-2552-2553-2554-2555-2556-2557-2558-2559-2560-2561-2562-2563-2564-2565-2566-2567-2568-2569-2570-2571-2572-2573-2574-2575-2576-2577-2578-2579-2580-2581-2582-2583-2584-2585-2586-2587-2588-2589-2590-2591-2592-2593-2594-2595-2596-2597-2598-2599-2600-2601-2602-2603-2604-2605-2606-2607-2608-2609-2610-2611-2612-2613-2614-2615-2616-2617-2618-2619-2620-2621-2622-2623-2624-2625-2626-2627-2628-2629-2630-2631-2632-2633-2634-2635-2636-2637-2638-2639-2640-2641-2642-2643-2644-2645-2646-2647-2648-2649-2650-2651-2652-2653-2654-2655-2656-2657-2658-2659-2660-2661-2662-2663-2664-2665-2666-2667-2668-2669-2670-2671-2672-2673-2674-2675-2676-2677-2678-2679-2680-2681-2682-2683-2684-2685-2686-2687-2688-2689-2690-2691-2692-2693-2694-2695-2696-2697-2698-2699-2700-2701-2702-2703-2704-2705-2706-2707-2708-2709-2710-2711-2712-2713-2714-2715-2716-2717-2718-2719-2720-2721-2722-2723-2724-2725-2726-2727-2728-2729-2730-2731-2732-2733-2734-2735-2736-2737-2738-2739-2740-2741-2742-2743-2744-2745-2746-2747-2748-2749-2750-2751-2752-2753-2754-2755-2756-2757-2758-2759-2760-2761-2762-2763-2764-2765-2766-2767-2768-2769-2770-2771-2772-2773-2774-2775-2776-2777-2778-2779-2780-2781-2782-2783-2784-2785-2786-2787-2788-2789-2790-2791-2792-2793-2794-2795-2796-2797-2798-2799-2800-2801-2802-2803-2804-2805-2806-2807-2808-2809-2810-2811-2812-2813-2814-2815-2816-2817-2818-2819-2820-2821-2822-2823-2824-2825-2826-2827-2828-2829-2830-2831-2832

... ..

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ORDER OF THE COURT: The Court orders that the defendant pay the costs of this proceeding.

and the fact that the ...

execute and deliver to your orator in substitution thereof the trust deed and notes herein sought to be foreclosed upon; that this substitution of securities was made for the purpose of enabling the said Sidney Kosterlik and Alice M. Kosterlik to increase by \$18,000 the indebtedness secured by the first mortgage upon the instant premises. Therefore, your orator states that the trust deed herein sought to be foreclosed upon and the notes secured thereby are security for an unpaid balance of purchase price for the premises here in question; that the premises were improved with a three-story apartment building containing thirty-six apartments, which apartments and halls, entrances, lobbies, etc., of said building were furnished with various articles of furniture and furnishings which "were at all times and still are either affixed to or so used and conducted as to form a part and parcel of the said premises and the buildings and appurtenances thereon and that the same were then and there and at all times thereafter, and still are used and rented as part of the household of each of said apartments," and that all of the said furniture and furnishings were in the building when possession thereof was delivered by complainant to the Kosterliks "pursuant to your orator's warranty deed" to them; that all of said furniture and furnishings were incumbered by a conditional contract of sale or other security or liens in favor of F. A. Wischolat & Company in the sum of \$17,800 and that complainant, on February 17, 1927, paid the said Company the \$17,800 and thereby became subrogated to whatever right, security, title, equity or interest in and to said articles of furniture and furnishings as was theretofore held by said Company; that the said \$17,800 was included in the purchase price paid by the Kosterliks to complainant for the premises; that

complainant at no time executed or delivered to the Hasterliks or any other person or persons a bill of sale, deed, quit-claim or any other instrument wherein complainant conveyed to any such person or persons his interest in or to said furniture and furnishings "except as said articles of furniture and furnishings were conveyed and transferred by your orator to the said Hasterliks as real property as part and parcel of the premises herein, as by said warranty deed is provided * * * said articles of furniture and furnishings being included in the subject matter of the considerations between the complainant and the said Hasterliks prior to the execution of this complainant's Warranty Deed aforementioned and terminating therein, and were included in the subject matter of the contracts and agreements between the parties relative thereto, and were included and considered by the parties as part of the 'real' estate conveyed by your orator to the said Sidney Hasterlik and Alice E. Hasterlik and as part of the 'real' estate and property which, it was at all times intended, was to be the security for the remaining indebtedness due to your orator from the consideration for the transfer thereof as the unpaid balance of the said purchase price therefor." The bill further alleges that the Hasterliks have made a fraudulent conveyance of the furniture and furnishings but that they still remain in possession of it, collect the income therefrom and retain the surplus. The bill further alleges facts tending to show that the conveyance of the chattel property by the Hasterliks was a violation of the Bulk Sales Law and therefore void. The bill also alleges that defendants threaten to remove the furniture and furnishings from the premises or to damage or destroy the same. Under the allegations of the bill we think that complainant has shown an equitable interest in the "furniture and furnishings" in question and that the temporary injunctive order in respect thereto was warranted.

The judgment order of the Superior Court of Cook County is affirmed.
APPROVED.
 Barnes, P.J., and Gridley, J., concur.

[illegible]

See Appendix 1 for information on the various types of
 questions that are asked in the test. The test is
 divided into two parts: a written part and a
 practical part. The written part consists of
 a series of questions on the various types of
 questions that are asked in the test. The
 practical part consists of a series of questions
 on the various types of questions that are asked
 in the test.

and continued to be in the same position until the end of the year.

and the fact that the Government has been unable to obtain the necessary information to make a proper assessment of the situation in the country.

...the

[illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

RE: [illegible] [illegible] [illegible] [illegible] [illegible]
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34330

CENTRAL LIFE INSURANCE
COMPANY OF ILLINOIS, a
corporation,

Appellee,

v.

WIDNEY HASTERLIK et al.,
Defendants,

LOUISE MANOR BUILDING
CORPORATION, a corporation,
and J. E. HARRIS, individually
and as trustee,

Appellants.

INTERLOCUTORY

APPEAL FROM INTERLOCUTORY
ORDER OF SUPERIOR COURT OF
COOK COUNTY APPOINTING
RECEIVER.

257 I.A. 653

MR. JUSTICE DEANLAN DELIVERED THE OPINION OF THE COURT.

Defendants J. E. Harris, individually and as trustee, and Louise Manor Building Corporation, a corporation, have appealed from an interlocutory order of the Superior Court of Cook County appointing a receiver of certain realty and personalty upon the sworn bill. This case was here consolidated for hearing with Central Life Insurance Company of Illinois v. Widney Hasterlik et al., Gen. No. 34329, in which an opinion has been filed this day. In that opinion appears a statement of certain allegations of the bill that are also relevant to the main question involved in the instant appeal. The defendant J. E. Harris, as trustee, is the mortgagee named in the chattel mortgage which the bill alleges was a fraudulent conveyance. The bill alleges that the legal title to the premises in question is now in Louise Manor Building Corporation but that the conveyance to it was fraudulent.

Appellants contend that "an interlocutory order for the appointment of a receiver must fix a time limit, not exceeding thirty days, for the filing of a complainant's bond," that "no time limit was fixed by the order during which such complainant's bond was required to be filed," and that "failing to fix any time



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252 L.L. 653

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limit, the order did not comply with the requirements of the statute and was erroneous." The order appealed from provided (inter alia) "that the appointment of said receiver be contingent upon the filing by the complainant of complainant's bond in the sum of \$800, with sureties to be approved by this court." This order was entered on January 31, 1930. The record shows that on February 1, 1930, the bond of the receiver was approved and filed. There is no merit in the present contention.

Appellants next contend that "the bond of complainant on application for the appointment of a receiver must run to the adverse party as obligee" and that the bond in the present case "runs to Sidney Masterlik et al.," as obligee and that such bond affords no protection to appellants and is not in compliance with the statute (Cahill's 1929 Ill. Rev. St. Ch. 33, Sec. 85), which provides "that before any receiver shall be appointed, the party making the application shall give bond to the adverse party * * * conditioned to pay all damages * * * Even if it be conceded that the bond did not comply with the statute as to form, defendants' remedy was by application to the court below and not by appeal. (See Schmidt v. Johnson, 106 Ill. App. 623, 627; Anderson v. Fultberg, 117 Ill. App. 231, 247.) Nor can we agree with the contention of the instant defendants that they could not maintain an action at law on the bond, as it is clearly apparent from its provisions that it was intended to indemnify all of the defendants whose "property, equitable interest, things in action, and effects" might come into the hands of the receiver.

In their reply brief defendants state that their principal contention is "the lack of any equitable right on the part of the complainant in the personally affected by the receivership and by the injunctive order." In Central Life Insurance Co. v. Masterlik

et al., supra (Gen. No. 34320), we held that under certain allegations of the bill complainant has shown an equitable interest in the "furniture and furnishings." If this holding is correct, as we think it is, there is no merit in the present contention.

The judgment order of the Superior Court of Cook County is affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 654'

BE IT REMEMBERED, that afterwards, to-wit: On

Feb 11, 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District

October Term, A.D., 1929

| | | |
|----------------------------|---|-----------------|
| THE PEOPLE OF THE STATE OF |) | |
| ILLINOIS, |) | |
| Defendant in error |) | ERROR TO THE |
| |) | |
| vs. |) | CIRCUIT COURT |
| |) | |
| GEORGE BLACKBURN, |) | OF OGLE COUNTY. |
| Plaintiff in error |) | |

OPINION by BOGGS, P. J.

Plaintiff in error was tried in the Circuit Court of Ogle County on an indictment consisting of six counts, three of which charged sales, and three possession of intoxicating liquor, with intent, etc. The jury returned a verdict finding plaintiff in error guilty in "1, 2, 3, 4, counts of the indictment". The motion made for a new trial was overruled, and judgment was rendered on the verdict. To reverse said judgment, this writ of error is prosecuted.

In his brief and argument counsel for plaintiff in error states that he "relies upon the three following propositions; First, that the court committed error in refusing the defendant's instructions offered, and each and all of them except one. Second, the court committed manifest error in not holding that the verdict of the jury was indefinite, uncertain and void. Third, the court erred in not giving a new trial on the affidavits of John Hayes and George Blackburn."

Defendant's first refused instruction is as follows:

"The court instructs the jury that if they can reconcile the evidence in this case upon any other reasonable theory or

In The

APPELLATE COURT OF ILLINOIS

Second District

October Term, A.D., 1909

ERROR TO THE
CIRCUIT COURT
OF COLE COUNTY.

THE PEOPLE OF THE STATE OF
ILLINOIS, Defendant in error
vs.
JAMES BLACKBURN, Plaintiff in error

OPINION BY JUDGE, P. 1.

Plaintiff in error was tried in the Circuit Court of Cole County on an indictment consisting of six counts, three of which charged sales, and three possession of intoxicating liquor, with intent, etc. The jury returned a verdict finding plaintiff in error guilty in "1, 2, 3, 4, counts of the indictment". The motion for a new trial was overruled, and judgment was rendered on the verdict. To reverse said judgment, this writ of error is presented.

In his brief and argument counsel for plaintiff in error states that he "relies upon the three following propositions: First, that the court committed error in refusing the defendant's instructions offered, and each and all of them except one. Second, the court committed manifest error in not holding that the verdict of the jury was indefinite, uncertain and void. Third, the court erred in not giving a new trial on the affidavits of John Hayes and George Blackburn."

Defendant's first proposed instruction is as follows: "The court instructs the jury that if they can reconcile

the evidence upon any other reasonable theory or

hypothesis than that of this defendant's guilt, it is your duty to do so and acquit the defendant."

This instruction states a correct principle of law, but as no question is raised as to the sufficiency of the evidence to support the verdict or judgment, we hold that plaintiff in error was not prejudiced by the refusal of the court to give the same.

The giving of instructions of the character of defendant's second and ninth refused instructions has been frequently condemned by the supreme court. *People v. Rogers*, 324 Ill. 224-235; *People v. Schuele*, 336 Ill. 336-371. The court therefore did not err in refusing the same.

The third refused instruction, so far as it stated correct principles of law, was covered by plaintiff in error's fourth given instruction. It is conceded that the court properly refused the fourth refused instruction. The fifth, sixth, and eighth refused instructions, so far as they state correct principles of law, are covered by the second given instruction. Refused instruction seven, so far as it states correct principles of law, is covered by plaintiff in error's fifth given instruction.

It is also contended that the court erred in refusing plaintiff in error's tenth refused instruction, and in modifying the same and giving the same as modified. The court did not err in this ruling. As tendered, this instruction has been condemned by the supreme court. This instruction, is a duplication of the defendant's second and third given instructions, and it would not have been error to have refused it. *People v. McKinnie*, 328 Ill. 631-639.

- As modified, said instruction was proper.

While the court gave a rather limited number of instructions on behalf of plaintiff in error, an examination of the same will disclose that the instructions given were sufficient to inform the jury as to the law governing plaintiff in error's defense as to the issues to be tried. To refuse an instruction which, in effect, merely repeats another already given, affords no ground for complaint. *People v. Dear*, 286 Ill. 142-153; *People v. Cash*, 326 Ill. 104-110; *People v. McKinnie*, 328 Ill. 637-639.

...the defendant.

This instruction states a correct principle of law, but as no question is raised as to the sufficiency of the evidence to support the verdict or judgment, we hold that plaintiff in error was not prejudiced by the refusal of the court to give the same.

The giving of instruction of the character of defendant's second and ninth refused instructions has been frequently condemned by the supreme court. People v. Rogers, 324 Ill. 324-325; People v. ... The court therefore did not err in refusing to give the same.

The third refused instruction, so far as it stated correct principles of law, was covered by plaintiff in error's fourth given instruction. It is conceded that the court properly refused the fourth refused instruction. The fifth, sixth, and eighth refused instructions, so far as they state correct principles of law, are covered by the second given instruction. Refused instruction seven, so far as it states correct principles of law, is covered by plaintiff in error's fifth given instruction.

It is also contended that the court erred in refusing plaintiff in error's eighth refused instruction, and in refusing the same. The court did not err in this. As modified, this instruction has been condemned by the supreme court. This instruction, as a duplication of the defendant's second and third given instructions, and it would not have been error to have refused it. People v. McKinnic, 328 Ill. 327-328.

As modified, said instruction was proper.

While the court gave a rather limited number of instructions on behalf of plaintiff in error, an examination of the same will disclose that the instructions given were sufficient to inform the jury as to the law governing plaintiff in error's defense as the issues to be tried. To refuse an instruction which, in error, merely repeats another already given, affords no ground for reversal. People v. ... People v. McKinnic, 328 Ill. 327-328.

While not included in the above specifications, in the argument counsel for plaintiff in error insist that the giving of defendant in error's seventh instruction constituted reversible error. This instruction is as follows:

"The court instructs the jury that the defendant having become a witness in his own behalf, become the same as any other witness, and that his testimony should be subjected to the same tests as are legally applied to the testimony of any other witness; that in determining the degree of credibility that should be accorded his testimony, the jury has the right to take into consideration the fact that he is interested in the result of the prosecution; that if, after considering all the evidence in the case, they should find that he has willfully and corruptly testified falsely to any fact material to the issue in the case, they have the right to disregard his testimony except insofar as it was corroborated by other credible evidence or facts and circumstances appearing in evidence."

The giving of instructions of this character has been approved by the supreme court in *People v. Harris*, 261 Ill. 517-525; *Spears v. People*, 220 Ill. 72; *Siebert v. People*, 143 Ill. 371; *Rider v. People*, 110 Ill. 11-13; *Marshmann v. People*, 101 Ill. 368; *People v. Daugherty*, 266 Ill. 430-434. However in *People v. Kircher*, 335 Ill. 200, *People v. Schuele*, 386 Ill. 366-371, and *People v. Washington*, 327 Ill. 152, the court condemned that portion of the instruction which states that "if, after considering all the evidence in the case, they should find that he (plaintiff in error) has willfully and corruptly testified falsely to any fact material to the case," they have the right to disregard his testimony, etc., for the reason that it singled out the defendant.

This instruction should not have been given. However, in view of the fact that no contention is being made that the evidence does not support the verdict, we would not be justified in reversing the judgment for the giving of this instruction. *Hoge v. People*, 117 Ill. 35-47; *Featherstone v. People*, 194 Ill. 325-339; *Glover v. People*, 204 Ill. 170-177; *Mash v. People*, 220 Ill.

86-91; Bleich v. People, 227 Ill. 80-84; People v. Schmidt, 292 Ill. 127-133.

It is next insisted that the verdict of the jury is uncertain and indefinite. Said verdict is as follows:

"We, the jury, find the defendant guilty in manner and form as charged in the 1, 2, 3, 4 counts of the indictment, in manner and form as therein charged. We find the defendants age to be 57 years."

The test of the sufficiency of a verdict is whether the intention of the jury can be ascertained, with reasonable certainty, and if that intention can be so ascertained, the verdict will be sustained. People v. Quesse, 310 Ill. 467-471; Lyons v. People, 68 Ill. 271-276; Stoltz v. People, 4 Scam. 168-170. Verdicts are not construed with the same strictness as pleadings in criminal cases, but all reasonable intendments will be indulged in to sustain them. People v. Quesse, supra, 471; People v. Blackburn, 170 Ill. 348-351; People v. Patrick, 277 Ill. 210-217; People v. Brown 273 Ill. 169-177; People v. Tierney, 250 Ill. 515-520; People v. Lee, 237 Ill. 272-273. Under the law as laid down in the foregoing authorities, the verdict of the jury clearly referred to the first, second, third and fourth counts of the indictment. The court did not err in holding said verdict sufficient.

Lastly, it is insisted that the court erred in refusing to grant a new trial on the ground of newly discovered evidence. In support of said motion, the affidavits of plaintiff in error and of one John B. Hayes, the city attorney of the city of Rochelle, were presented. Said affidavits are set forth in the abstract as follows:

"Affidavit of defendant, George Blackburn, in support of motion. George Blackburn stating that after the close of the said trial he discovered among the files of Attorney Fred A. Wirick, deceased, a bill of particulars furnished by John B. Hayes, City Attorney, setting forth that said Blackburn was charged with the violation of the Prohibition Act by having sold one-half pint of intoxicating liquor to John McLain in 1928 for which he paid One Dollar also for selling one pint of liquor on October 16, 1928, for \$2.00. That the name of this witness was given to John B. Hayes by

It is next insisted that the verdict of the jury is un-

limited and indefinite. Said verdict is as follows:

"We, the jury, find the defendant guilty of murder in the first degree."

It is then charged in the 1, 2, 3, & 4 counts of the indictment, in

order and form as therein charged. We find the defendant guilty

of murder in the first degree.

The last of the allegations of a verdict is that the

verdict of the jury can be ascertained, with reasonable certainty,

that that intention can be ascertained, the verdict will be

maintained. People v. Guesse, 210 Ill. 427-431; People v. People,

211 Ill. 374-377; People v. People, 210 Ill. 370-374. Verdicts are

construed with the same strictness as decisions in criminal

cases, but all reasonable inferences will be indulged in to up-

hold the verdict. People v. Guesse, 210 Ill. 427-431; People v. People,

211 Ill. 374-377; People v. People, 210 Ill. 370-374. Verdicts are

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211 Ill. 374-377; People v. People, 210 Ill. 370-374. Verdicts are

construed with the same strictness as decisions in criminal

cases, but all reasonable inferences will be indulged in to up-

Mr. Schade and Mr. Brooker who testified against this affiant in the above entitled cause; that said McLain, Mr. Schade, Mr. Brooker and Mrs. Brooker were the names furnished in said bill of particulars; that the name of Hugh Stultz did not appear; that these were the same alleged violations of the Prohibition Act to which said Mr. Schade, Mr. Brooker and Mrs. Brooker testified to on the trial of this defendant in the Cir cuit Court of Ogle County; he further states that since said trial he has observed and finds that the rays from the electric light near the street corner of his home do not fall on the back door or within 10 feet. And it would not be possible from this light to see the transaction as testified by Schade, Brooker and Mrs. Brooker."

"Affidavit of John B. Hayes stating that on or about the 15th day of October, A.D., 1928, he was City Attorney of the City of Rochelle; that during the month of October, A.D., 1928, he was called upon to prosecute one George Blackburn on the complaint of L. P. Brooker for the possession and sale of intoxicating liquor in violation of an ordinance of the said City of Rochelle on the 15th and 16th day of October, A.D., 1928; that following the arrest of said defendant, George Blackburn, he furnished Fred A. Wirick, Attorney for said defendant a bill of particulars setting forth the names of the witnesses who were to appear and testify against said Blackburn; that Theodore L. Schade and L. P. Brooker gave him the names of the said witnesses and that they stated one John McLain was the person who purchased intoxicating liquor of George Blackburn on the 15th and 16th days of October, A.D., 1928; that this affiant prepared and signed a bill of particulars hereto attached, and delivered the same to Fred A. Wirick, Attorney for said George Blackburn."

In this connection, the bill of particulars referred to was presented, which is to the same general effect as the affidavit of the witness Hayes.

Motions for a new trial on the ground of newly discovered evidence are not looked on with favor by the courts, and are closely scrutinized. People v. LeMorte, 289 Ill. 11-21; People v. Dabney,

... that the name of John Smith is not correct; that there was
the same alleged violations of the Prohibition Act as to which said
W. Schade, Mr. Brooker and Mrs. Brooker testified to on the trial of
this defendant in the City Court of Erie County; he further
states that since said trial he has observed and knows that said
from the electric light near the street corner of his home do not
fall on the back door or within 10 feet. And it would not be possible
from this light to see the transaction as testified by Schade, Brooker

"Affidavit of John B. Hayes stating that on or about the
15th day of October, A.D., 1933, he was City Attorney of the City
of Rochester; that during the month of October, A.D., 1933, he was
called upon to prosecute one George Blackburn on the complaint of
J. E. Brooker for the possession and sale of intoxicating liquors
and 15th day of October, A.D., 1933; that following the arrest
of said defendant, George Blackburn, he furnished Fred A. Whelan,
attorney for said defendant a bill of particulars setting forth
the names of the witnesses who were to appear and testify against said
Blackburn; that Theodore L. Schade and J. E. Brooker gave him the
names of the said witnesses and that they stated one John Schade
was the person who purchased intoxicating liquor of George Blackburn
on the 15th and 16th days of October, A.D., 1933; that this defendant
prepared and signed a bill of particulars hereto attached, and
caused the same to be filed in said City Court, to-wit: on said date

In this connection, the bill of particulars referred to
and presented, which is in the last-mentioned exhibit in this
at the witness Hayes.
Motion for a new trial on the ground of newly discovered
evidence was not taken or will take by the court, and was denied.

315 Ill. 322-327; People v. Madden, 518 Ill. 137-165.

In People v. Dabney, supra, the court at page 328 says:

"The evidence must fulfill the following requirements:

First, it must appear to be of such conclusive character that it will probably change the result if a new trial is granted; second, it must have been discovered since the trial; third, it must be such as could not have been discovered before the trial by the exercise of due diligence; fourth, it must be material to the issue; and, fifth, it must not be merely cumulative to the evidence offered on the trial. People v. Pennell, (ante, p. 124;) People v. LeMorte, supra; People v. Williams, 242 Ill. 197; Henry v. Peaple, 198 id. 162."

The direct purpose of said affidavits is to impeach the testimony of the witnesses Schade, Brooker and Ethel Brooker. A new trial should not be granted for newly discovered evidence, the purpose of which is to impeach the testimony of some witnesses. People v. Grady, 125 Ill. 122-126; People v. Johnson, 286 Ill. 108-114; People v. Heinen, 300 Ill. 498-504. The court did not err in overruling the motion for a new trial on account of newly discovered evidence.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Affirmed.

In People v. Madden, supra, the court at page 127 says:

"The evidence must fulfill the following requirements:

First, it must appear to be of such conclusive character that it will probably change the result if a new trial is granted; second, it must have been discovered since the trial; third, it must be such as would not have been discovered before the trial by the exercise of due diligence; fourth, it must be material to the issue; and, fifth, it must not be merely cumulative to the evidence offered on the trial. People v. Madden, supra, p. 127; People v. Madden, supra; People v. Madden, 218 Ill. 127; People v. Madden, 218 Ill. 127.

The direct purpose of said affidavits is to impeach the

testimony of the witnesses Schade, Brooker and Ethel Brooker. A

new trial should not be granted for newly discovered evidence, the

purpose of which is to impeach the testimony of some witnesses.

People v. Madden, 218 Ill. 127-128; People v. Madden, 218 Ill. 127-128.

People v. Madden, 218 Ill. 127-128. The court did not say

in overruling the motion for a new trial on account of newly dis-

covered evidence.

For the reasons above set forth, the judgment of the trial

court will be affirmed.

REVEREND

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

1a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 654²

BE IT REMEMBERED, that afterwards, to-wit: On

Feb 11 1930
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS

Second District

October Term, A.D. 1929.

HARRY MINTS, trading by the name
and style of ELAINE DRESS CO.,
Plaintiff in Error.

-vs-

S. P. BURGESS, J. J. BURGESS and
O. F. HILDEBRANDT,
Defendants in Error.

ERROR TO THE
CIRCUIT COURT OF
ROCK ISLAND COUNTY.

OPINION by BOGGS, P. J.

An action in assumpsit was instituted in the circuit court of Rock Island County by plaintiff in error, hereinafter called plaintiff, against defendants in error, hereinafter called defendants, and one E. H. Stapp, to recover for merchandise sold to Frederick M. Dunham & Co., of Rock Island. Service was not had on the defendant Stapp.

The declaration sets forth that the defendants were desirous that plaintiff extend credit to said Dunham & Co., and, to induce and persuade plaintiff to extend such credit, entered into the following contract of guaranty:

"Please sell to Frederick M. Dunham & Co., at lowest prices and regular terms such merchandise as the said Frederick M. Dunham & Co., may from time to time select, and in consideration thereof, we hereby guarantee and hold ourselves personally responsible for the payment at maturity at the purchase price of merchandise so sold and delivered.

"We hereby waive notice of acceptance hereof, amounts or dates of sales and notices of default in payment.

"This guarantee to remain in force until such time as

In The

UNITED STATES COURT OF DISTRICT

Second District

October Term, A.D. 1929.

WILLIAM H. HARRIS, Plaintiff,
vs.
J. J. HARRIS, Defendant.

WILLIAM H. HARRIS, Plaintiff,
vs.
J. J. HARRIS, Defendant.

WILLIAM H. HARRIS, Plaintiff,
vs.
J. J. HARRIS, Defendant.

OPINION BY ROGERS, P. J.

An action in assumpsit was instituted in the circuit court of Rock Island County by plaintiff in error, hereinafter called plaintiff, against defendants in error, hereinafter called defendants. One E. H. Stapp, to recover for merchandise sold to Frederick M. & Co., of Rock Island. Service was not had on the defendant.

The declaration sets forth that the defendants were those that plaintiff extend credit to said Dunham & Co., and, to use and persuade plaintiff to extend such credit, entered into the following contract of guaranty:

"Please sell to Frederick M. Dunham & Co., at lowest and regular terms such merchandise as the said Frederick M. & Co., may from time to time select, and in consideration thereof we hereby guarantee and hold ourselves personally responsible for the payment at maturity of the purchase price of merchandise so sold and delivered."

the Frederick M. Dunham Co., may present satisfactory financial statement for your approval of their credit requirements from your firm, when it becomes void and is to be returned.

"Witness our hands and seals this twenty-seventh day of December, 1923, A. D."

The declaration further avers acceptance of said guaranty, extension of credit, etc., in reliance thereon, claiming damages, etc.

A plea of the general issue was filed by all of the defendants. In addition thereto, the defendants S. P. Burgess and J. J. Burgess filed thirteen special pleas. The pleas 2 to 13, inclusive, are similar in character, each setting up a note or trade acceptance given by Dunham & Co., to the plaintiff, averring that such trade acceptances or notes included and evidenced a part of the indebtedness of Dunham & Co., which had accrued prior to the date of such instrument, and operated to extend the time of payment thereof, without the consent of said defendants, who were thereby discharged from the guaranty to that extent. The total of the notes and trade acceptances set up in the pleas greatly exceeded the credit extended. The fourteenth or additional plea set up that, on October 16, 1924, said defendants delivered to plaintiff a written withdrawal from the guaranty mentioned in the declaration.

Plaintiff replied that said notes and trade acceptances did not evidence or include the indebtedness or any part thereof mentioned in the declaration, and that plaintiff did not take, accept or receive them or any or either of them in payment of or on account of such indebtedness. As to the additional plea, plaintiff denied that notice was delivered to him as in said plea alleged.

A trial was had, resulting in a verdict in favor of the defendants. Judgment was rendered thereon against plaintiff, in bar of action and for costs. To reverse said judgment, this writ of error is prosecuted.

Dunham & Company was engaged in selling merchandise by mail, at Rock Island. Prior to October 1, 1924, the defendant S. P. Burgess was the president of said corporation, and one Israel

... your approval of their credit recommendations from your
... it becomes void and is to be returned.

"Witness our hands and seals this twenty-seventh day

December, 1934, A.D."

The declaration further avers acceptance of said prom-
... extension of credit, etc., in reliance thereon, claiming dam-
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A plea of the general issue was filed by all of the
... In addition thereto, the defendants S. P. Burgess and
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... are similar in character, each setting up a note or trade
... acceptance given by Dunham & Co., to the plaintiff, averring that
... notes included and evidenced a part of the
... of Dunham & Co., which had matured prior to the date of
... instrument, and operated to extend the time of payment thereof,
... the consent of said defendants, who were thereby discharged
... to that extent. The total of the notes and trade
... set up in the plea greatly exceeded the credit extended.
... or additional plea set up that, On October 12, 1934,
... delivered to plaintiff a written withdrawal from the
... mentioned in the declaration.

PLAINTIFF TELLS THAT SAID NOTES AND TRADE ACCEPTANCES

... not evidence or include the indebtedness on any part thereof men-
... in the declaration, and that plaintiff did not take, accept
... or any or either of them in payment of or on account
... As to the additional plea, plaintiff denied
... was delivered to him as is said plea alleged.

A trial was had, resulting in a verdict in favor of
... To reverse said judgment, this writ of
... is prosecuted.

Dunham & Company was engaged in selling merchandise
... the defendant
... was the president of said corporation, and one Daniel

Schomer was its manager. One Harry M. Hires succeeded Schomer as manager in 1924, and became its secretary in the early part of 1925. The defendant Hildebrandt succeeded Burgess as president on October 1, 1924.

Plaintiff was a manufacturer of dresses under the trade name of Elaine Dress Co. On December 27, 1923, said guaranty was delivered to plaintiff. All merchandise shipped prior to December 9, 1924, under said guaranty, was paid for by said corporation. From time to time thereafter, merchandise was shipped to said corporation, some of which plaintiff concedes was paid for, but claims that at the time suit was brought there was owing a balance of \$9,536.51. About July 31, 1925, Dunham & Company went into bankruptcy. Plaintiff testified that he had received a dividend from the bankruptcy court of \$493.44, for which amount said company is entitled to credit.

S. P. and J. J. Burgess withdrew from the firm of Dunham & Company about October 1, 1924. Said defendants testified that on October 17, 1924, they sent the following letter to plaintiff:

"Inasmuch as the undersigned have disposed of their interest in the Fred'k M. Dunham & Co., and are no longer connected with the company in any capacity, we herewith withdraw any guarantee for payment on merchandise purchases, which may have been given by Mr. Israel Schomer at the inception of the company. This for your information."

Plaintiff specifically denied ever having received said letter. The only difference in the defenses of the Burgesses and of Hildebrandt is in connection with said letter. If said letter was in fact sent by the Burgesses and was received by plaintiff, then, as to all goods delivered thereafter, said defendants would not be liable therefor.

It is the contention of all of the defendants in support of the verdict and judgment, that the goods for which this suit is brought were all paid for by Dunham & Company by the delivery to plaintiff of certain trade acceptances and judgment notes. The Burgesses further insist that, as to them, the giving of certain of said trade acceptances and notes had the effect of extending the time of payment for such goods; that said time was so extended without notice to them. As the record discloses that the aggregate amount of the

... succeeded ... One Harry M. Hines succeeded ... and became its secretary in the early part of 1923. ... succeeded ... as president on October 1, 1924.

Plaintiff was a manufacturer of dresses under the name of Hines Dress Co. On December 27, 1923, said company delivered to defendant. All merchandise shipped prior to December 31, 1924, under said guaranty, was paid for by said corporation. From time to time thereafter, merchandise was shipped to said corporation, some of which plaintiff concedes was paid for, but claims that at the time suit was brought there was owing a balance of \$3,538.51. Plaintiff went into bankruptcy. Plaintiff had received a dividend from the bankruptcy estate of \$438.44, for which amount said company is entitled to credit. H. P. and J. J. Burgess withdrew from the firm of Hines Dress Co. on October 1, 1924. Said defendants testified that on October 17, 1924, they sent the following letter to plaintiff:

"Inasmuch as the undersigned have disposed of their interest in the Fred'k M. Hines & Co., and are no longer connected with the company in any capacity, we herewith withdraw any guarantee for payment of merchandise purchased, which may have been given by Fred'k M. Hines & Co. at the inception of the company. This for your consideration."

Plaintiff specifically denied any such receipt and letter. The only difference in the defenses of the defendants and of Hines Dress Co. is in connection with said letter. It was sent by the defendants and was received by plaintiff. As to all goods delivered thereafter, said defendants would not be liable therefor.

It is the contention of all of the defendants in the verdict and judgment, that the goods for which this suit is brought were all paid for by Hines Dress Co. and that the liability of said defendants to pay for such goods was extinguished by the giving of certain of said notices and notes had the effect of extending the time of payment for such goods; that said time was so extended without notice to the plaintiff. As the record discloses that the defendants

same was greater than the amount of the indebtedness sued for, if the contention of said defendants is sound, plaintiff would have no right of action against them.

It is the contention of plaintiff, as to all of said notes and trade acceptances, with the exception of a trade acceptance for \$717.85, that they were not delivered or accepted as payment for any specific invoice or invoices of goods, nor as payment on said indebtedness, but were delivered to and used by plaintiff as a means for raising funds with which to conduct his business and to furnish the merchandise which Dunham & Company was from time to time ordering, and were so understood by Dunham & Company.

The facts and circumstances disclosed by the record strongly corroborate plaintiff's position. On December 23, 1924, trade acceptances to the amount of \$15,000 were delivered by Dunham & Company to plaintiff. On January 2, 1925, eliminating said \$15,000 in trade acceptances, the amount owing to plaintiff was \$12,636.39. If, as contended by the defendants, said trade acceptances of \$15,000 were applied as payment on said indebtedness, the account would have been paid, leaving a surplus to the credit of Dunham & Company. Notwithstanding this, on January 2, 1925, additional trade acceptances to the amount of \$10,000 were delivered by Hildebrandt, the manager of Dunham & Co., to plaintiff. This transaction strongly tends to support plaintiff's theory that said trade acceptances were not delivered to or received by him in settlement for said goods. Then, too, on May 30, 1925, Dunham & Company wrote plaintiff as follows:

"My Dear Mints: Pursuant to our arrangements I enclose to you herewith two trade acceptances, each in the sum of \$2,500.00, one due July 20th and one due August 20th. Also two judgment notes of \$2,500.00 each due on the same dates. I wish you would try to have these discounted for us. If you can get these discounted we will be willing to use a substantial part of the proceeds to apply on your account."

It might also be observed that said trade acceptances and notes were delivered to plaintiff without any account being stated, and without reference to any particular invoice, except as to the one

item of \$717.85. Certain of said trade acceptances were not used and were returned by plaintiff to Dunham & Co. Dunham & Company received no remittance slips from plaintiff except when checks or cash had been received by plaintiff, or amounts had been received in payment of said trade acceptances.

This being the state of the record, it was eminently necessary that the record be substantially free from error.

One of the grounds urged for a reversal of said judgment is that the court erred in its rulings on the evidence. Plaintiff was asked by his counsel: "Did anyone of these notes or trade acceptances except the trade acceptance for \$717.35, which was paid by the remittance slip marked plaintiff's exhibit 7, ever have an amount that corresponded with the sum total of any invoice or invoices?" "Answer: No." On motion of the defendants, this answer was stricken. Plaintiff was also asked: "I will ask you whether at any time he told you in any of those conversations that these notes and trade acceptances were intended as payment for invoices?" An objection to this question was sustained. He was then asked: "Did Mr. Hildebrandt or any officer of Dunham & Co., ever ask you in connection with any of the trade acceptances and notes which have been introduced in evidence in this case, to postpone the date of payment on your accounts on account of such notes and trade acceptances or either of them?" Also: "Did you say to Mr. Hildebrandt or to anybody else connected with the Dunham Co., that you would accept any or either of these notes or trade acceptances in payment of your accounts or by way of extension of time on your accounts?"

General objections to each of these questions were sustained. If answered, these questions would have tended to prove whether or not said trade acceptances were delivered to plaintiff in settlement, in whole or in part, of said indebtedness. As that was one of the questions to be determined by the jury from the evidence, the court erred in its rulings in connection with said offered testimony.

It is also insisted that, by cross examining plaintiff in connection with the alleged letter which the Burgesses testified they wrote him on October 17, 1924, to the effect that they had severed their connections with said corporation, the defendants in effect

...of said trade accountants were not read and
...by plaintiff to Dungan & Co. Dungan & Co. never received
...from plaintiff except when checks or cash had been
...of plaintiff, or accounts had been received in payment of said

This being the state of the record, it was eminently
necessary that the record be substantially true and correct.

One of the grounds urged for a reversal of said judgment
was that the court erred in its rulings on the evidence. Plaintiff

asked by his counsel: "Did anyone of these notes or checks

...except the trade accountance for \$1717.85, which was paid

the defendant also received plaintiff's exhibit V, even have an

amount that corresponded with the sum total of any invoice or invoice?"

Answer: "No." On motion of the defendants, this answer was stricken.

Plaintiff was also asked: "I will ask you whether at any time he told

...of those conversations that these notes and trade accountances

...as payment for invoice?" An objection to this

question was sustained. He was then asked: "Did Mr. Hildebrandt or

any officer of Dungan & Co., ever ask you in connection with any of

...trade accountances and notes which have been introduced in evidence

...this case, to postpone the date of payment on your accounts on ac-

count of such notes and trade accountances or either of them?" Answer:

"No, you say to Mr. Hildebrandt or to anybody else connected with the

Dungan Co., that you would accept any or either of these notes or

...accountances in payment of your accounts or by way of extension

time on your accounts?"

General objections to each of these questions were

sustained. It answered, these questions which were asked to prove

whether or not said trade accountances were delivered to plaintiff in

payment, in whole or in part, of said indebtedness. As that was

one of the questions to be determined by the jury from the evidence,

the court erred in its rulings in connection with said offered testimony.

It is also insisted that, by cross examining plaintiff

in connection with the alleged letter which the Dungan Company testified

...on October 17, 1914, to the effect that they had not

...their connection with said corporation, the defendants in effect

made plaintiff, as to such subject matter, their witness. This point is not well taken. The court did not err in its rulings in this connection.

It is also contended that the court erred in admitting a purported copy of said letter in evidence. This point is not well taken. It was for the jury finally to say whether or not said letter had been written to and received by plaintiff.

It is next insisted that the court erred in its rulings on the instructions. Instruction 30 on behalf of the defendants is as follows:

"The court instructs the jury that while the law makes the plaintiff a competent witness in this case, yet the jury have a right to take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, as shown by the evidence, and give to his testimony only such weight as in your judgment it is fairly entitled to."

While it has been held proper for a court to give an instruction of this character where the defendant is a corporation (West Chicago S. Ry. Co. v. Dougherty, 170 Ill. 379-382; Chicago & E. I. R. R. Co. v. Burrige, 211 Ill. 9-13; Korn v. Chicago Rys. Co., 27. Ill. 329-334-335), our supreme and appellate courts have uniformly held that, where both parties are natural persons, instructions of this character are not proper. Chicago & E. I. R. R. Co. v. Burrige, supra, 13; Geohegan v. Union E. R. R. Co., 266 Ill. 482-498; Godair v. Natl. Bank, 235 Ill. 572-576; Helbig v. Citizens Ins. Co., 234 Ill. 251-258; Sangster v. Hatch, 134 App. 340-342; Hartshorn v. Hartshorn, 179 App. 241-244; Purgett v. Weinrank, 212 App. 22-32; Engstrom v. Olson, 248 App. 480-488.

The testimony of plaintiff was of vital importance in support of his case. If the jury believed his testimony, he never received the purported letter, notifying him of the disposal by the Burgesses of their interest in said corporation. While there was some testimony in corroboration of the plaintiff in this connection, yet his testimony was the only evidence in direct denial thereof. The giving of said instruction was prejudicial to the rights of

the plaintiff.

Instruction 8, on behalf of the defendants, among other things, states: "The court further instructs the jury that if you believe from all the evidence in the case, and other instructions of the court in this case," etc. This instruction was erroneous, in telling the jury they might make a finding "from the evidence and other instructions of the court," etc.

Defendants' instruction 14 is as follows:

"The court further instructs the jury that the account sued on in this case between the plaintiff and Freder'k M. Dunham & Company was what is called an open account for goods and merchandise sold, and that the taking of a trade acceptance or note from Freder'k M. Dunham & Company, the principal debtor, by plaintiff, the creditor, would, provided that such was the intention of the said parties, amount to a merger into the trade acceptance or note of such part of the open account, if any, as you may believe was so evidenced by such note or trade acceptance, and in this case if you believe from all the evidence in the case that any trade acceptance or note in evidence was given by Freder'k M. Dunham & Company to plaintiff, said Elaine Dress Company, it being the intention of both of said parties that said open account to the amount of said trade acceptance or note be discharged and such trade acceptance or note be taken in payment of said open account to the amount of said trade acceptance or note, then the defendants were discharged from their alleged liability as guarantors to the amount of such trade acceptance or note, if any, on such open account."

The giving of this instruction was prejudicial error, in that it practically told the jury that the mere receiving of said trade acceptances and notes by plaintiff from Dunham & Company would, in and of itself, merge so much of the indebtedness as such trade acceptance or note might cover. It was also erroneous in that it practically assumes that it was the intention of Dunham & Company and of plaintiff that the notes and trade acceptances so delivered by Dunham & Company to plaintiff should be in discharge of so much of the indebtedness in question as would be covered by the amount of such notes or trade acceptances.

Testimony, on behalf of the defendants, among other things, was: "The court further instructed the jury that it was to take from all the evidence in the case, and other instructions of the court in this case," etc. This instruction was repeated, in full, the jury might make a finding "that the evidence and other instructions of the court," etc.

Defendants' instruction is as follows:

"The court further instructed the jury that the account was on in this case between the plaintiff and Federal Reserve Bank of New York, and that the taking of a trade acceptance or note from Federal Reserve Bank of New York, the plaintiff, by defendant, the defendant, would, provided that such was the intention of the said parties, amount to a merger into the trade acceptance or note of each part of the open account, if any, as you may believe was so evidenced by such note or trade acceptance, and in this case if you believe from all the evidence in the case that any trade acceptance or note in evidence was given by Federal Reserve Bank of New York to defendant, said trade acceptance, it being the intention of both of said parties that said open account to the amount of said trade acceptance was to be discharged and such trade acceptance or note be taken in payment of said open account to the amount of said trade acceptance or note, then the defendants were discharged from their alleged liability as guarantors to the amount of such trade acceptance or note, if any."

The giving of this instruction was prejudicial error, in that it practically told the jury that the mere receiving of such trade acceptance and notes by defendant from Federal Reserve Bank, in and of itself, merged so much of the indebtedness as such trade acceptance or note might cover. It also amounts to that it practically assumed that it was the intention of Federal Reserve Bank of New York that the notes and trade acceptances so delivered by Federal Reserve Bank to defendant should be in discharge of so much of the indebtedness as would be covered by the amount of such trade acceptance or note.

Twelve instructions, similar in character, were given on behalf of the defendants, based on certain of said notes and trade acceptances. If said instructions were otherwise proper, it was prejudicial error for the court to give so large a number of instructions to the jury with reference to what would effect a discharge of said indebtedness in whole or in part. The decisions of the courts are uniform in so holding. *Adams v. Smith*, 58 Ill. 417-419; *People v. Harrison*, 261 Ill. 517-527; *Nelson v. Chicago Ry. Co.*, 163 App. 98-103; *Daubach v. Drake Hotel Co.*, 243 App. 293-303.

There was practically no evidence on which to base an instruction with reference to the intention of said parties. The court erroneously excluded evidence which was properly admissible on that issue.

Several of said instructions submitted to the jury the question as to whether it was the intention of Dunham & Company in delivering, and of plaintiff in accepting said notes and trade acceptances, to extend the time of payment thereon. The instructions in this connection were not carefully guarded.

It might also be observed that, so far as the record discloses, said notes and trade acceptances might have been given for indebtedness other than that sued for in this case. The burden of proof in this connection was on the defendants, to show that said notes and trade acceptances were given in settlement, in whole or in part, of the indebtedness here sued for.

It is also insisted that prejudicial remarks were made by counsel for the defendants in his closing argument. To a certain extent, the remarks complained of were provoked by counsel for the plaintiff. He is therefore not in a position to successfully urge this assignment of error.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Twelve instructions, similar in character, were given on behalf of the defendants, based on certain of said notes and trade acceptances. If said instructions were otherwise proper, it was prejudicial error for the court to give as large a number of instructions to the jury with reference to what would effect discharge of said indebtedness in whole or in part. The decisions of the courts are uniform in withholding. Adams v. Smith, 22 Ill. 41-42; People v. Harrison, 221 Ill. 217-227; Nelson v. Chicago Ry. Co., 183 App. 102-108; Dandash v. Drake Hotel Co., 248 App. 17-22.

There was practically no evidence on which to base an instruction with reference to the intention of said parties. The court erroneously excluded evidence which was properly admissible on that issue.

Reversal of said instructions submitted to the jury the question as to whether it was the intention of Bankers & Company in delivering, and of plaintiff in accepting said notes and trade acceptances, to extend the time of payment thereon. The instructions in this connection were not carefully granted.

It might also be observed that, so far as the record discloses, said notes and trade acceptances might have been given

for indebtedness other than that sued for in this case. The burden of proof in this connection was on the defendants, to show that said notes and trade acceptances were given in settlement of such an indebtedness, of the indebtedness here sued for.

It is also insisted that prejudicial remarks were made by

counsel for the defendants in his closing argument. To a certain extent, the remarks complained of were provoked by counsel for the plaintiff. He is therefore not in a position to successfully urge this assignment of error.

For the reasons above set forth, the judgment of the trial

court will be reversed and the cause will be remanded.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

12
AT A TERM OF THE APPELLATE COURT,

7
Begun and held at Ottawa, on Tuesday, the Fourth day of February, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 654³

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

MAR 22 1930
Clerk's office of said Court, in the words and figures
following, to-wit:

HERMAN V. BITTORF, AND :
 LEO J. WAHL, :
 APPELLEES. :
 :
 V. :
 :
 WILLIAM TYPER, ET AL :
 APPELLANTS :

APPEAL FROM THE CIRCUIT
 COURT OF WHITESIDE COUNTY

OCTOBER TERM, 1929

Jett:j

This suit was brought in the circuit court of Whiteside County by Herman V. Bittorf and Leo J. Wahl, appellees, against William Typer, et al. appellants, for the purpose of enforcing a contract entered into between the stockholders, and to obtain an order directing equitable contribution by appellants to reimburse appellees for certain moneys they claim to have laid out, or become liable for in order to effect a consolidation of two banks, known as the State Bank of Sterling, and the Farmer's and Merchants State Bank of Sterling.

The record discloses that the State Bank of Sterling and the Farmer's and Merchants State Bank were in distressed financial circumstances during the year of 1926 and in January of 1927. The State Bank of Sterling was in a much worse condition than the Farmers and Merchants State Bank. The liquidation of the State Bank of Sterling was evident.

In order to bring about a merger or consolidation of the two banks, certain persons were appointed by the officers, and directors of the respective banks, clothed with authority to work out a plan of consolidation. The committees were authorized to investigate the assets and liabilities of the banks. The Committee appointed by the State Bank of Sterling, was to investigate the assets and liabilities of the Farmers and Merchants State Bank, and the Committee of the Farmers and Merchants State Bank was appointed and authorized to investigate the assets and liabilities of the State Bank of Sterling. These two committees reported and the consolidation of the two banks was consummated. The new bank into which the two banks were

RETURN FROM THE CIRCUIT COURT OF WISCONSIN COUNTY

WILLIAM TYLER, ET AL
A PETITIONER

OCTOBER TERM, 1922

113

This suit was brought in the circuit court of Wisconsin County by Herman V. Eddy and Leo J. Wahl, appellees, against William Tyler, et al, appellants, for the purpose of enforcing a contract entered into between the stockholders, and to obtain an order directing equitable contribution by appellants to reimburse appellees for certain moneys they claim to have laid out, or become liable for in order to effect a consolidation of two banks, known as the State Bank of Sterling, and the Turner and Merchants State Bank of Sterling.

The record discloses that the State Bank of Sterling and the Turner and Merchants State Bank were in distressed financial circumstances during the year of 1922 and in January of 1927. The State Bank of Sterling was in a much worse condition than the Turner and Merchants State Bank. The liquidation of the State Bank of Sterling was evident.

In order to bring about a merger or consolidation of the two banks, certain persons were appointed by the officers, and directors of the respective banks, clothed with authority to work out a plan of consolidation. The committee were authorized to investigate the assets and liabilities of the banks. The committee appointed by the State Bank of Sterling, was to investigate the assets and liabilities of the Turner and Merchants State Bank, and the committee of the Turner and Merchants State Bank was appointed and authorized to investigate the assets and liabilities of the State Bank of Sterling. These two committees reported and the consolidation of the two banks was recommended. The new bank into which the two banks were

merged is the Central Trust and Savings Bank. Under the arrangement of consolidation, each stockholder in the old bank was to receive one-half share of stock in the new bank, in lieu of a full share of stock they held in the other banks.

As a condition of the merger, it was agreed that certain assets of doubtful value should be eliminated from both banks and not carried over into the new bank, and among the assets of the State Bank of Sterling, which were objected to, was an item of \$81,010.00 known as "Frozen assets."

After the two committees appointed by the respective banks, had reported, more than two-thirds of the officers, directors and stockholders of the State Bank of Sterling held a meeting on January 7th, 1927, at which the following agreement was entered into:-

"We, the undersigned, stockholders of the State Bank of Sterling, in consideration of the mutual promises to each other and in consideration of our present liability to the depositors of the said State Bank of Sterling, Sterling, Illinois. Whereas, the State Bank of Sterling, Sterling, Illinois, and the Farmers and Merchants State Bank of Sterling, Sterling, Illinois, are to be consolidated, and Whereas, if the same are consolidated, there are certain assets now owned by the State Bank of Sterling which are not liquid and will not become a part of the assets of the new organization to be formed and to be known as the Central Trust and Savings Bank, Sterling, of Sterling, Illinois, and Whereas, it is necessary in order to bring about the consolidation of said banks, that certain notes and obligations, the assets of the said respective banks, shall be endorsed and guaranteed by individual stockholders of the said banks, and Whereas, some of the individual stockholders of the State Bank of Sterling will endorse and guarantee the payment of certain assets of the said State Bank of Sterling to the said Central Trust and Savings Bank, Sterling, in order that the same may

... is the Central Trust and Savings Bank, which is
... to receive one-half share of stock in the new bank, in lieu of a
... Full share of stock they held in the other banks.
As a condition of the merger, it was agreed that certain
assets of doubtful value should be eliminated from both banks
and not carried over into the new bank, and among the assets
of the State Bank of Sterling, which were objected to, was an
item of \$81,010.00 known as "Frozen assets".
After the two committees appointed by the respective
banks, had reported, more than two-thirds of the officers,
directors and stockholders of the State Bank of Sterling held
a meeting on January 7th, 1937, at which the following agreement
was entered into:
"We, the undersigned, stockholders of the State Bank of
Sterling, in consideration of the mutual promises to each other
and in consideration of our present liability to the stockholders
of the said State Bank of Sterling, Sterling, Illinois,
whereas, the State Bank of Sterling, Sterling, Illinois, and
the Farmers and Merchants State Bank of Sterling, Sterling,
Illinois, are to be consolidated, and
now owned by the State Bank of Sterling which are not liable
and will not become a part of the assets of the new organization
to be formed and to be known as the Central Trust and Savings
Bank, Sterling, of Sterling, Illinois, and
whereas, it is necessary in order to bring about the consolida-
tion of said banks, that certain notes and claims on the
assets of the said respective banks, shall be endorsed and
guaranteed by individual stockholders of the said banks, and
whereas, some of the individual stockholders of the State Bank
of Sterling will endorse and guarantee the payment of certain
assets of the said State Bank of Sterling in and out of the
State and Savings Bank, Sterling, Illinois, and the new bank

become assets of said Central Trust and Savings Bank, and Whereas, there are other assets of the said State Bank of Sterling in the form of notes and obligations, which will not be taken over by the Central Trust and Savings Bank, Sterling, and which will be liquidated as soon as possible, as the assets of the State Bank of Sterling and shall be the property of the stockholders of the said State Bank of Sterling, subject to the repayment to the individual stockholders who loaned the money the said State Bank of Sterling and subject to the expense of liquidation; the said assets shall be liquidated as soon as possible under the direction of the board of directors of the said State Bank of Sterling and applied on the liabilities of the said State Bank of Sterling, and

Whereas, it is the desire of all of the stockholders of said State Bank of Sterling to protect the persons who guarantee the payment of the assets in question to the Central Trust and Savings Bank, Sterling, and who purchased from the State Bank the frozen assets of said bank for the purpose of liquidation, against loss.

It is Hereby Agreed that each stockholder for the above consideration mentioned and the consideration of the said certain individuals endorsing the guaranteeing said notes and obligations to the said Central Trust and Savings Bank, Sterling, and by loaning sufficient money to the said State Bank of Sterling on the questionable assets of said bank, that if any loss is sustained by the said individuals who guaranteed the assets to the Central Trust and Savings Bank, Sterling, or furnished the money by loaning to the State Bank of Sterling sufficient money to replace the questionable notes and obligations which do not become a part of the assets of the Central Trust and Savings Bank, Sterling, each of the undersigned stockholders hereby guarantees and promises to pay to said individuals his or her pro rata share of the loss sustained, if any, to the full amount of the stock held by each of the said undersigned stockholders in the State Bank of Sterling at the time of signing

... assets of said Central Trust and Savings Bank, and
... assets of the said State Bank of
... in the form of notes and obligations, which will not
... by the Central Trust and Savings Bank, Sterling, and
... which will be liquidated as soon as possible, as the assets of
... the State Bank of Sterling and shall be the property of the
... of the said State Bank of Sterling, subject to the
... to the individual stockholders who loaned the money
... the said State Bank of Sterling and subject to the expenses of
... liquidation; the said assets shall be liquidated as soon as
... possible under the direction of the board of directors of
... the said State Bank of Sterling and verified by the liquidator
... of the said State Bank of Sterling, and
... whereas, it is the desire of all of the stockholders of said
... State Bank of Sterling to protect the persons who contributed
... the payment of the assets in question to the Central Trust and
... Savings Bank, Sterling, and who purchased from the State Bank
... the frozen assets of said bank for the purpose of liquidation,
...
... It is hereby agreed that each stockholder for the above
... consideration mentioned and the consideration of the said con-
... said individuals endorsing the foregoing said notes and
... obligations to the said Central Trust and Savings Bank, Sterling,
... and by loaning sufficient money to the said State Bank of Sterling
... on the questionable assets of said bank, that if any loss is
... sustained by the said individuals who guaranteed the assets
... to the Central Trust and Savings Bank, Sterling, as mentioned
... the money by loaning to the State Bank of Sterling sufficient
... to replace the questionable notes and obligations which
... do not become a part of the assets of the Central Trust and
... Savings Bank, Sterling, each of the undersigned stockholders
... hereby guarantee and agree to pay to said individuals his
... or her own share of the loss sustained, if any, to the full
... amount of the stock held by each of the said undersigned stock-
... holders in the State Bank of Sterling at the time of signing

this agreement, said payments of loss to be made on a pro rata basis according to the number of shares so held by each individual.

And it is Further Provided, that if the assets of said bank so taken over by the stockholders who make the loan to said bank shall pay out, so that all of the claims against said bank shall be liquidated, then the balance above the amount of the claims against the bank and expenses of liquidation shall be paid to the said stock holders on a pro rata basis, according to the number of shares of stock held at the time of signing this agreement.

This Agreement shall be binding upon the heirs, executors, administrators and assigns of the respective parties hereto. Dated this 7th day of January, A.D. 1927. H. V. Bittorf, Robert W. Besse, N. G. Van Sant, Leo J. Wahl, S. S. Kehr,, Wm. L. Frye, E. T. Janssen, John M. Kohl, J. L. Snavelly, H. L. Snavelly, John Pippert Estate by H. Pippert, Ex., John M. Stager, Conrad Speidel, H. M. Weyrauch, E. A. Ashling, A. J. Long, John H. Reitzel, H. J. Bowen, Geo. L. Carolus, Geo. E. Whisler, P. J. Peters, John Courtright, Est. By Amanda Gould, Ex., A. M. Clavin, W. W. Wahl, Wm. C. McCue, R. D. Arnold, Rollo E. Ewers, A. P. Reed, John K. Reed, Fred B. Frerichs, Wm. Typer."

It appears from the evidence that the said frozen assets were taken over by Bittorf, Wahl and certain other stockholders, directors and officers of the State Bank of Sterling, and that they gave their notes for the sum of \$81,010.00. At the time of the trial only a small amount of this sum had been paid. In the final analysis there was considerable loss sustained. It is for the purpose of compelling contributions by the stockholders that this suit was brought by appellees. The question therefore, raised upon this record is, can appellees maintain this suit against appellants to compel contribution towards the payment of the sum of \$81,010.00, and the loss sustained by appellees and others who took over the frozen assets?

After the making up of the issues the case was referred

And it is further provided, that in the event of said bank as taken over by the stockholders who were the loan to said bank shall pay out, so that all of the claims against said bank shall be liquidated, then the balance above the amount of the claims against the bank and expenses of liquidation shall be paid to the said stockholders on a pro rata basis, according to the number of shares of stock held at the time of signing this agreement.

This Agreement shall be binding upon the heirs, executors, administrators and assigns of the respective parties hereto. Witness my hand and seal of office, this 1st day of January, 1901, at New York, N. Y.

Witness my hand and seal of office, this 1st day of January, 1901, at New York, N. Y.

Witness my hand and seal of office, this 1st day of January, 1901, at New York, N. Y.

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Witness my hand and seal of office, this 1st day of January, 1901, at New York, N. Y.

It appears from the evidence that the said loan was made to the bank as taken over by the stockholders, and certain other stockholders, directors and officers of the State Bank of New York, and that they have their notes for the sum of \$1,000,000. At the time of the trial only a small amount of this loan had been paid. In the trial evidence there was considerable testimony established. It is for the purpose of cancelling contributions by the stockholders that this suit was brought by appellants. The parties hereto, named upon this record, is, and shall remain, the parties to this suit, and appellants maintain this suit against appellants for counsel fees and disbursements towards the payment of the sum of \$1,000,000, and the loan sustained by appellants and others who took over the bank as taken over by the stockholders.

to the Master in Chancery to take and report testimony and his conclusions. The master reported and found that the equities were with the complainants, appellees here; that it was to the best interest of all the parties to the suit that the undisposed of bad assets be sold; that the complainants, appellees, were entitled to a decree, both under the agreement between the stockholders and under the constitution of the State of Illinois; that the stockholders were liable to the amount of the par value of their stock, if the amount of the par value is required to pay the appellees. The decree of the court embraced all of the findings of the master and overruled all of the exceptions of appellants, holding all of the stockholders liable under the agreement in controversy, and under the constitution of the state, and found that the appellants pay to appellees and others the amount of money they advanced to effect the consolidation of the banks, with five per cent interest, and that the stockholders all contribute except those advancing money, and the payment of money as might be required to pay any deficiency of the \$31,010.00 which certain stockholders advanced which the collection of the bad assets failed to meet, and any moneys paid by the guarantors of the guaranteed assets of the said bank.

It is the contention of appellants that the frozen assets were purchased by appellees and others, and for that reason they are not in a position to maintain a suit as stockholders against appellants. The contract to which we have referred, when considered in all its details, does not sustain the position of appellants, and as a matter of fact, the record does not support such contention.

Appellees insist that the filing of the bill was for the purpose of determining the loss on the assets taken over by appellees and others and on the terms they guaranteed and to require individual stockholders to make good their pro rata share of the loss by an accounting and determination of the amount, pursuant to the arrangement by which these assets were taken over.

The evidence is not disputed that these bad assets were

as the Board of Directors in this and other matters and the
... The master has been and found that the evidence
were with the complainant, especially that it is to the
best interest of all the parties to the suit that the withdrawal
of the assets be made; that the complainant, especially, were
entitled to a decree, both under the agreement between the
associations and under the constitution of the State of Illinois;
that the stockholders were liable for the amount of the par value
of their stock, in the amount of the par value as required by
law the complainant. The decree of the court embraced all of the
findings of the master and overruled all of the exceptions of
the complainant, holding all of the stockholders liable under the
agreement in controversy, and under the constitution of the state,
and found that the complainant may be appointed and others the
amount of money they advanced to effect the constitution of the
bank, with five per cent interest, and that the stockholders all
contribute except those advancing money, and the payment of money
as might be required to pay any deficiency of the \$11,000.00 which
certain stockholders advanced when the collection of the bank
assets failed to meet, and any money paid by the guarantors of
the guaranteed assets of the said bank.

It is the contention of the complainant that the assets
were purchased by the said and others, and that the reason they
are not in a position to maintain a suit as stockholders against
the bank. The contract to which we have referred, when con-
sidered in all its details, does not contain the position of
the complainant, and as a matter of fact, the record does not support
the contention.

... the Board of Directors of the Bank was the
... of the Bank, the fact that the assets were
... and others and on the other hand, the fact that
... to make good their own note there
... and destruction of the same,
... the complainant is the complainant in this case and others were
... the complainant is not limited to the assets and others were

required to be taken out of the State Bank before the consolidation could be effected.

William L. Frye who was cashier of the State Bank, among other things testified that the assets listed "bad" were taken out entirely of the banks' assets. When cross examined as to what was done pursuant to the resolution he said "The notes were taken out and put in the trusteeship for liquidation for the benefit of all the stockholders;" that the parties who took over the bad assets to liquidate them, informally designated Leo Wahl as trustee to represent them, and to take the initiative toward liquidation. The said William L. Frye further testified that he was the cashier of said bank in January, 1927; that he kept a record of the \$81,010.00 turned into the State Bank; that this amount went into the business on the night of January 12th and the morning of January 13th, 1927.

The record discloses that the original records were produced and the account placed in evidence; the account shows the following: Bittorf put in \$19,500 beside endorsing real estate notes of \$17,300, Wynn Denver Stock, 13,000 and 53 shares of Chicago & Northwestern Railway Company stock, valued at \$3800, a total of \$43,500; and appellee Wahl put in \$19,000.

Frye further testified that at a later date certain other stockholders were persuaded to put in a portion of this \$81,010. and his record of the names and amounts of these payments was introduced.

Briefly, it can be stated that the record discloses as a condition of the merger, it was agreed that certain assets of doubtful value should be eliminated from both banks and not carried over into the new bank. Among the assets of the State Bank of Sterling which were objected to was an item of \$81,010 known as "frozen" assets, and in order to make up this amount on behalf of the bank a number of the directors and stockholders entered into a written agreement whereby they took over such frozen assets and loaned to the bank \$81,010.

was to be taken out of the State Bank before the completion
of the plan as proposed.

William L. Wye who was cashier of the State Bank, among
other things testified that the assets listed "bank" were taken
out entirely of the bank's assets. When these assets were
what was done pursuant to the resolution as well as the notes
were taken out and put in the trust company for liquidation for
the benefit of all the stockholders; that the parties who had
over the bank assets to liquidate them, informally designated
as well as trustees to represent them, and to take the initiative
toward liquidation. The said William L. Wye further testified
that he was the cashier of said bank in January, 1937; that he
had a record of the \$51,010.00 turned into the State Bank;
that this amount went into the business on the night of January
1937 and the morning of January 1937, 1937.

The record discloses that the original record was
lost and the record placed in evidence; the record states
the following: Amount put in \$19,500 beside endorsing cash
estate notes of \$14,000, Wye Denver Stock, \$1,000 and \$5 shares
of Chicago & Northwestern Railway Company stock, valued at
\$3800, a total of \$45,500; and cashless Wye put in \$19,000.
Wye further testified that at a later date certain other
stockholders were persuaded to put in a portion of this \$19,000,
and his record of the names and amounts of these payments was
introduced.

Relatively, it can be stated that the record discloses as a
condition of the merger, it was agreed that certain assets of
doubtful value should be eliminated from both banks and not
carried over into the new bank. Among the assets of the State
Bank of which which were objected to was an item of \$1,010
known as "Bosman" assets, and in order to take up this amount
on behalf of the bank a number of the directors and stockholders
entered into a written agreement whereby they took over such
these assets and loaned to the bank \$1,010.

It will be seen that this agreement provides that whatever might be realized upon the "frozen" assets should be used to pay off the stockholders who had signed the agreement, and if any balance remained the same should be distributed among those who signed the agreement.

In view of the facts as established, the question to be determined is whether or not appellees, maintaining the position they do with reference to the taking over of the "frozen" assets, can maintain an action as stockholders against stockholders of the State Bank of Sterling, basing their right of recovery upon the constitutional provision, or, are they limited, if entitled to recover at all, to maintain their suit against those who entered into the contract under date of January 7th, 1927?

The stockholders liability created by the constitution, is to the creditors of the corporation and is a several and individual liability on the part of each stockholder to each creditor. It is not liability to the corporation or to the creditors of the corporation as a class, but to each individual creditors of the corporation as a class, but to each individual creditor on the part of each individual stockholder. Therefore, it is the creditors alone, individually or collectively who can enforce the liability by such remedies as the law affords. The appellees are not such creditors. *Golden vs. Cervenka*, 278 Ill. 409-435-436; *Wincock vs. Trupin* 98 Ill. App. 135. The liability of the stockholders to the creditors, thought created by the constitution, is based upon contract. A person who becomes a stockholder assumes primary liability to the creditors of the corporation to an amount equal to his stock. He offers to become liable individually, to the amount provided by the constitution and is bound by contract to all persons contracting with the corporation. *Golden vs. Cervenka*, 278 Ill. 409-441; *Bell vs. Farwell*, 176 Ill. 489.

If the right to relief on the part of appellees was al-

It will be seen that this statement is not correct. It should be noted that the "Tobacco" cases should be read in view of the fact that the stockholders who had signed the agreement, and if any balance remained the same should be distributed among those who signed the agreement.

In view of the facts as established, the question to be determined is whether or not appellants, maintaining the position they do with reference to the taking over of the "Tobacco" cases, can maintain an action as stockholders against stockholders of the State Bank of Kentucky, bearing their right of recovery upon the constitutional provision, or, are they limited, if entitled to recover at all, to maintain their suit against those who entered

into the contract which was the basis of the corporation. The stockholders liability created by the constitution is to the creditors of the corporation and is a several and individual liability on the part of each stockholder to each creditor. It is not liability to the corporation or to the members of the corporation as a class, but to each individual creditor of the corporation as a class, but to each individual stockholder on the part of each individual stockholder. Therefore, it is the traditional rule, individually or collectively who can enforce the liability by such remedies as the law affords. The appellants are not such creditors. *Johnson v. Government, 200 Ill. 400-458-459; Wincock v. Train 98 Ill. App. 123. The liability of the stockholders to the creditors, though created by the constitution, is based upon contract. A contract has become a stockholder's contract, and liability to the creditors of the corporation to an amount equal to his stock. He often becomes liable individually, to the amount provided by the constitution and is bound by contract to all persons contracting with the corporation. *Johnson v. Government, 200 Ill. App. 123, 124, 125. It is not to be relied on the part of appellants who are**

together predicated upon the constitutional provision with respect to liability and contribution of stockholders, we would be bound to reverse the decree and direct that one be entered in favor of appellants, but, under the pleadings and the contract entered into under date of January 7th, 1927, it appears to us that appellees have a right to relief against all the stockholders who joined in that contract under the date last above mentioned. The constitutional provision is for the benefit of creditors of a defunct bank, and does not make a joint or several liability in favor of stockholders. We do not think that there can be any contribution had by any of the stockholders who did not become a party to the contract of January 7th, 1927. Some of the appellants were not parties to that agreement, nor did they by any act, ratify the agreement or receive benefits under it which would render them liable according to its terms. It is true that they received one-half share in the new bank for each share they held in the old bank but this was a result of the merger agreement and not of the "frozen" assets agreement. The two agreements are separate and distinct. Included among appellants are two estates, that of John Pippert, deceased, by H. Pippert Executor, and that of John Courtwright, deceased, of which estate Amanda Gould is executrix. Appellants contend that the only method of procedure against these estates is to file claims in the probate court. This might be true if the contract appellees are seeking to enforce, had been signed by the deceased; but can be true of a contract signed by the executor or executrix years after the death of the testator and the probating of his estate?

Moreover, the stock they owned had been transferred on the books of the bank in the name of the executor and executrix, and stood that way at the time of the consolidation of the two banks in question. The contracts in question were not executed by any person now deceased, but were signed by individuals who were ~~sued~~ sued, that is by the executor and executrix of the two estates respectively. By their acts in executing this

...provision with
...liability and contribution of stockholders, we would
...the board to reverse the decision and direct that one be entered
...of appellants, but, under the existing law, the contract
...into under date of January 7th, 1927, it appears to us that
...have a right to relief against all the stockholders who
...in that contract under the date last above mentioned. The
...provision is for the benefit of creditors of a
...bank, and does not make a joint or several liability in
...of stockholders. We do not think that there can be any
...had by any of the stockholders who did not become a part
...of January 7th, 1927. Some of the appellants were
...that agreement, nor did they by any act, ratify the agree-
...it was made under its terms and it is not binding on them
...to its terms. It is true that they received one-half
...in the new bank for each share they held in the old bank
...of the merger agreement and not of the
...The new agreement is binding on
...two estates, that of John
...by M. Vincent Emerson, and that of John
...deceased, of which estate Amanda Gould is executrix.
...that the only method of procedure against these
...in the probate court. This right is
...and seeking to enforce, had been
...but can be true of a contract signed by
...after the death of the testator
...of his estate.

However, the above they cannot have transferred on the
...of the bank in the name of the executor and administratrix,
...of the time of the consolidation of the two
...The estate is now in probate and is being
...of the estate and executrix,
...of the two estates respectively. By their acts in executing this

contract more than two years ago they represented that they had authority to execute them. They accepted the benefit of the contract the same as the other parties who joined in the contract. The record does not disclose the instruments under which they were appointed so we do not know whether they are acting in the capacity of trustees or what their authority is. They cannot now, on this appeal for the first time, claim that their execution of the contracts are not binding on them.

In conclusion, we are of the opinion that the decree entered in this cause should be reversed as to all those who did not join in the contract under date of January 7, 1927.

The decree is therefore reversed and cause remanded with directions to modify the decree by finding in favor of the appellants who are not parties to the contract in question.

Reversed and remanded with directions.

...that they are not binding on them.
...at this point for the first time, again that their agreement is
...agreement of trustees or what their authority is. They cannot now
...were examined as we do not know whether they are acting in the
...The record does not disclose the instructions under which they
...trust the same as the other parties who joined in the contract.
...authority is executed there. They accepted the benefit of the con-
...contract was made and they are not bound by it.

In conclusion, we are of the opinion that the decree
entered in this cause should be reversed so as to leave the
did not join in the contract under date of January 8, 1907.
The decree is therefore reversed and cause remanded with
directions to modify the decree by finding in favor of the
appellants who are not parties to the contract in question.
Reversed and remanded with instructions.

STATE OF ILLINOIS,

SECOND DISTRICT

} 88.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

2
AT A TERM OF THE APPELLATE COURT, A

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 654⁴

BE IT REMEMBERED, that afterwards, to-wit: On

APR 5 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS

Second District

FEBRUARY TERM, A.D. 1930

| | | |
|---------------------------------|---|----------------------|
| PEOPLE OF THE STATE OF ILLINOIS |) | |
| Defendant in Error |) | |
| |) | |
| -vs- |) | |
| |) | Error to the Circuit |
| SOLLEY PETRILLI, |) | Court of Whiteside. |
| Plaintiff in Error |) | |

OPINION by BOGGS, P. J.

The grand jury of Whiteside County returned an indictment against plaintiff in error, consisting of three counts. The first count charged the unlawful sale of intoxicating liquor, as a second offense. The second count charged the unlawful possession of intoxicating liquor, as a second offense, and the third count charged the unlawful furnishing of intoxicating liquor, etc. The third count was nollied by the State's attorney.

A motion to quash the indictment was overruled. A plea of not guilty was entered, and on the trial plaintiff in error was found guilty under the first count, but not as a second offense. A motion for a new trial, made by plaintiff in error, was overruled. Thereupon a motion in arrest of judgment was made, which was overruled. Judgment was rendered on the verdict, and plaintiff in error was sentenced to six months in the county jail and fined \$500.00 and costs. To reverse said judgment, this writ of error is prosecuted.

It is first contended that the court erred in overruling the motion to quash the indictment. It is insisted in effect that, in pleading a former conviction, it is necessary that the

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DIVISION
JANUARY TERM, A.D. 1930

| | | |
|---|------|---|
| PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error | -vs- | SOLIMY BETHLEHEM,
Plaintiff in Error |
|---|------|---|

OPINION OF THE COURT

The Grand Jury of Whiteside County returned an indictment against plaintiff in error, consisting of three counts. The first count charged the unlawful sale of intoxicating liquor, as a second offense. The second count charged the unlawful possession of intoxicating liquor, as a second offense, and the third count charged the unlawful furnishing of intoxicating liquor, etc. The third count was nolleed by the State's attorney.

A motion to quash the indictment was overruled. A plea of not guilty was entered, and on the trial plaintiff in error was found guilty under the first count, but not as a second offense. A motion for a new trial, made by plaintiff in error, was overruled. Thereupon a motion in arrest of judgment was made, which was overruled. Judgment was rendered on the verdict, and plaintiff in error was sentenced to six months in the county jail and fined \$300.00 and costs. To reverse said judgment, this writ of error is prosecuted.

It is first contended that the court erred in overruling the motion to quash the indictment. It is stated in effect that, in placing a former conviction, it is necessary that the

former indictment be set out in the indictment charging the second offense. This point is not well taken. It is only necessary to allege in apt words the former conviction. *People v. Tate*, 316 Ill. 52-57. The court did not err in overruling said motion, especially in view of the fact that the first count of the indictment was a good count for a first offense under the statute. *People v. Talbot*, 322 Ill. 416-424.

It is next insisted that the court erred in overruling the motion for a rule on the State's attorney to furnish a bill of particulars. Whether a bill of particulars shall be furnished rests in the sound legal discretion of the court, and, unless that discretion has been abused, a judgment should not be disturbed for the failure to grant such motion. *People v. Donaldson*, 215 Ill. 19-28; *People v. Gray*, 251 Ill. 431-437; *People v. Sepisch*, 237 App. 128; *People v. Brown*, 150 App. 365-369; The record fails to disclose that plaintiff in error was prejudiced by the ruling of the court denying said motion. That being the state of the record, the court did not err in denying the same. *People v. Boykin*, 298 Ill. 11-22. It might be further observed that, even conceding that the trial court should have granted said motion, plaintiff in error is not in a position to assign error on said ruling, as this ruling was not called to the attention of the trial court in the written motion for a new trial, and is not in the assignment of errors in this court. *Erickson v. Ward*, 256 Ill. 259-263; *Lerette v. Director General*, etc. 306 Ill. 348-356.

It is also insisted that the court erred in admitting in evidence a certified copy of the record of plaintiff in error's former conviction, on the ground that the judgment was not sufficiently set forth. The judgment offered in evidence met all the requirements to make a judgment admissible. *see record*

It is further insisted that plaintiff in error's rights were prejudiced by the admission of said record. If the indictment had not charged a second offense, it would have been error for the court to have admitted this record, as it did not show conviction of a felony. However, as the indictment charging a

...be set out in the indictment charging the

second offense. This point is not well taken. It is only

necessary to allege in apt words the former conviction. People

v. ... 111. 32-33. ...

said motion, especially in view of the fact that the first count

of the indictment was a good count for a first offense under the

statute. People v. ... 111. 415-416.

It is now insisted that the court erred in overruling

the motion for a rule on the State's attorney to furnish a bill

of particulars. Whether a bill of particulars shall be furnished

rests in the sound legal discretion of the court, and, unless

that discretion has been abused, a judgment should not be dis-

turbed for the failure to grant such motion. People v. ...

... 111. 17-18. ...

... 111. 337-338; The

record fails to disclose that plaintiff in error was refused

of the ruling of the court denying said motion. That being the

state of the record, the court did not err in denying the same.

People v. ... 111. 12-13. ...

... even assuming that the trial court was in error

said motion, plaintiff in error is not in a position to sustain

... on this point, as the record was not taken in the first

tion of the trial court in the written motion for a new trial,

and is not in the assignment of errors in this court. ...

v. ... 111. 337-338; ...

... 111. 348-349.

It is also insisted that the court erred in admitting in

evidence a certified copy of the record of plaintiff in error's

former conviction, on the ground that the judgment was not

sufficiently set forth. The judgment offered in evidence was

all the requirements to make a judgment admissible. ...

It is further insisted that plaintiff in error's conviction

was not disclosed by the admission of said record. If the indict-

ment had not charged a second offense, it would have been error

for the court to have admitted this record, as it did not show

conviction of a felony. However, as the indictment charging a

second offense was sufficient, the State had the right to offer evidence in support thereof. The mere fact the jury may not have found plaintiff in error guilty of a second offense would not render the admission of said record erroneous.

It is next insisted that the verdict of the jury is not supported by the evidence. Two witnesses for the People testified positively to some three or four sales of intoxicating liquor. Plaintiff in error testified, denying the making of such sales. The evidence was clearly sufficient to support the verdict of the jury, and the court did not err in refusing to grant a new trial on account of the weight of the evidence.

It is next contended that the court erred in giving to the jury the second, ninth, eleventh and twenty-second instructions on behalf of the People.

An examination of the second instruction will disclose that the court did not err in giving the same, for, if the jury found as required by the instruction, they were warranted in finding the defendant guilty under the indictment in this case.

The ninth instruction is as follows:

"You are instructed that the rule requiring the Jury to be satisfied of a defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the Jury should be satisfied beyond a reasonable doubt of every fact or circumstance that may be in evidence tending to show that the defendant is guilty; it is sufficient, if, taking the evidence altogether, the jury are satisfied, beyond a reasonable doubt, that the defendant is guilty."

This instruction has been frequently approved by the supreme court (Weaver v. People, 132 Ill. 536-542; Siebert v. People, 143, Ill. 571-592; People v. Scarbak, 245 Ill. 435-438; People v. Duncan, 261 Ill. 339-359; People v. Davis, 300 Ill. 218-233;) although in the later cases it has been criticized. People v. Prall, 314 Ill. 518-525; People v. Johnson, 317 Ill. 430-435. In view of the evidence in the record, however, we would not be justified in reversing the judgment for the giving

...the State had the right to offer evidence in support thereof. The mere fact that the jury may not have found plaintiff in error guilty of a second offense would not render the admission of said record erroneous.

It is next insisted that the verdict of the jury is not supported by the evidence. Two witnesses for the People testified positively to some three or four sales of intoxicating liquor. Plaintiff in error testified, denying the making of such sales. The evidence was clearly sufficient to support the verdict of the jury, and the court did not err in refusing to grant a new trial on account of the weight of the evidence.

It is next contended that the court erred in giving to the jury the second, ninth, eleventh and twenty-second instructions on behalf of the People.

An examination of the second instruction will disclose that as required by the instruction, they were warranted in finding the defendant guilty under the indictment in this case.

The ninth instruction is as follows:

"You are instructed that the rule requiring the jury to be satisfied as to a defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of every fact or circumstance that may be in evidence tending to show that the defendant is guilty; it is sufficient, if, taking the evidence altogether, the jury are satisfied beyond a reasonable doubt that the defendant is guilty."

This instruction has been frequently approved by the Supreme Court (Wester v. People, 132 Ill. 383-385; Siebert v. People, 143, Ill. 571-582; People v. Acord, 245 Ill. 453-455; People v. Hanson, 241 Ill. 382-383; People v. Davis, 200 Ill. 424-425); although in the latter cases it has been criticized. People v. Hall, 214 Ill. 518-522; People v. Johnson, 217 Ill. 424-425. In view of the evidence in the record, however, no error can be found in refusing the judgment for the People.

of this instruction.

The eleventh instruction states a correct principle of law, and the court did not err in giving the same.

The twenty-second instruction states that the jury "are not to disregard the testimony of any witness in this case, simply because such witness may have been employed to procure evidence of the unlawful selling of intoxicating liquor, but you should consider the evidence of such witness and weigh the same by the same rules that you do the evidence of any other witness."

It is insisted that this instruction singles out certain of the witnesses and gives undue prominence to their testimony. We are inclined to hold that this point is well taken. However, the giving of the instruction does not constitute reversible error, in view of the conclusive character of the evidence. *Hoge v. People* 117 Ill. 35-47; *Glover v. People*, 204 Ill. 170-177; *People v. Schmidt*, 292 Ill. 127-133.

Lastly, it is insisted that the court erred in refusing to grant the motion for a new trial on account of newly discovered evidence.

Motions for a new trial on the ground of newly discovered evidence are not looked on with favor, and are closely scrutinized. *People v. LeMorte*, 289 Ill. 11-21; *People v. Dabney*, 215 Ill. 322-327; *People v. Madden*, 318 Ill. 157-165. Newly discovered evidence, to warrant the granting of a new trial, must not be merely cumulative. *Harätner v. People*, 204 Ill. 159-162; *People v. Stathus*, 303 Ill. 326-330; *People v. Mindeman*, 318 Ill. 157-165. It must be such as will be conclusive of the result. *Harätner v. People*, supra; *Beam v. People*, 124 Ill. 576; *Cline v. People*, 113 Ill. 396; *People v. Wright*, 237 Ill. 580-586; *People v. LeMorte*, supra, 22; *People v. Dabney*, supra, 328. In the latter case, the court at page 328, in discussing this question, says:

"The evidence must fulfill the following requirements: First, it must appear to be of such conclusive character that it will probably change the result if a new trial is granted; second, it must have been ~~discovered~~ discovered since the trial;

The eleventh instruction states a correct principle of law, and the court did not err in giving the same.

The twenty-second instruction states that the jury

"are not to disregard the testimony of any witness in this case,

simply because such witness may have been charged to procure

evidence of the unlawfully killing of innocent life, but you

should consider the evidence of such witness and weigh the same

by the same rules that you do the evidence of any other witness."

It is insisted that this instruction singles out certain

of the witnesses and gives undue prominence to their testimony.

We are inclined to hold that this point is well taken. However,

the giving of the instruction does not constitute reversible

error, in view of the conclusive character of the evidence. *People*

v. People, 117 Ill. 38-47; *Glover v. People*, 206 Ill. 170-177;

People v. People, 227 Ill. 101-102.

Lastly, it is insisted that the court erred in refusing

to grant the motion for a new trial on account of newly dis-

covered evidence.

Motions for a new trial on the ground of newly discovered

evidence are not looked on with favor, and are easily rebutted.

People v. People, 117 Ill. 38-47; *People v. People*, 117 Ill. 38-47.

325-327; *People v. People*, 218 Ill. 187-188. Newly discovered

evidence, to warrant the granting of a new trial, must not be

merely cumulative. *People v. People*, 206 Ill. 170-177; *People*

v. People, 206 Ill. 328-330; *People v. People*, 218 Ill. 187-

188. It must be shown as well as conclusive or the result. *People*

v. People, 218 Ill. 328-330; *People v. People*, 218 Ill. 328-330;

People v. People, 218 Ill. 328-330; *People v. People*, 218 Ill. 328-330;

People v. People, 218 Ill. 328-330; *People v. People*, 218 Ill. 328-330;

In the latter case, the court at page 328, in discussing this

question, says:

"The evidence must fulfill the following requirements:

First, it must appear to be of such conclusive character that it

will probably change the result if a new trial is granted; sec-

ond, it must be such as to show that the original trial was

third, it must be such as could not have been discovered before the trial by the exercise of due diligence; fourth, it must be material to the issue; and fifth, it must not be merely cumulative to the evidence offered on the trial. *People v. Pennell*, (ante, p. 124;) *People v. LeMorte*, supra; *People v. Williams*, 242 Ill. 197; *Henry v. People*, 198 id 162."

The newly discovered evidence here relied on for a new trial is not of a conclusive character. It is all of an impeaching nature. As a general proposition, a new trial will not be granted to afford an opportunity to impeach a witness. *People v. Grady*, 125 Ill. 122-126; *People v. Johnson*, 286 Ill. 108-114; *People v. Heinen*, 300 Ill. 498-504. In the latter case the court at page 504 says:

"It must be a very extraordinary case that will cause a court to grant a new trial in order to impeach a witness, as such course would establish a dangerous precedent."

The court did not err in denying a new trial for newly discovered evidence.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

On Petition for Rehearing: Plaintiff in error, in his petition for rehearing, for the first time seeks to question the sufficiency of the record of the former conviction on the ground that the same was not properly verified. This point was not made in the brief filed by plaintiff in error in this court, and the abstract contains only the following as to such verification: "Verification, J.W.Kelly." This being the state of the record, plaintiff in error is not in a position to raise this question in his petition for rehearing.

Opinion modified by adding, following "all the requirements to make a judgment admissible" on page 2, the words "so far as disclosed by the abstract," and petition for rehearing denied.

*added
by order
of court
6-28-70*

It must be such as would not have been discovered before the trial by the exercise of due diligence; fourth, it must be material to the issue; and fifth, it must not be merely cumulative to the evidence offered on the trial. People v. Kennedy, (ante, p. 124); People v. Belmont, supra; People v. Williams, 102 Ill.

197; Henry v. People, 102 Ill. 128.

The newly discovered evidence here relied on for a new trial is not of a conclusive character. It is all of an impeaching nature. As a general proposition, a new trial will not be granted to allow an opportunity to impeach a witness. People v.

Gray, 125 Ill. 123-124; People v. Johnson, 102 Ill. 103-104; People v. Nelson, 100 Ill. 433-434. In the latter case the court

at page 304 says:

"It must be a very extraordinary case that will cause a court to grant a new trial in order to impeach a witness, as such course would establish a dangerous precedent."

The court did not say in granting a new trial for newly discovered

evidence.

Nothing is reversible error in the record, the judgment of

the trial court will be affirmed.

Rehearing denied.

On Petition for Rehearing: Plaintiff in error, in his petition for rehearing, for the first time seeks to question the sufficiency of the record of the former conviction on the ground that the same was not properly verified. This point was not made in the brief filed by plaintiff in error in this court, and the abstract contains only the following as to such verification: "Verification, J.W. Kelly." This being the state of the record, plaintiff in error is not in a position to raise this question in his petition for rehearing.

Opinion modified by adding, following "all the requirements to make a judgment admissible" on page 2, the words "so far as disclosed in the abstract," and petition for rehearing denied.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

3 AT A TERM OF THE APPELLATE COURT, A

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in the year of our Lord one thousand nine hundred and thirty, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 655'

BE IT REMEMBERED, that afterwards, to-wit: On

APR 5 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

-VS-

Appeal from the
Circuit Court of
Kane County.

An action on the case was instituted by appellee against appellant in the circuit court of Hancock County to recover for personal injuries and damages to property, resulting from a collision between appellee's automobile and one of appellant's street cars on Highland avenue, in Elgin, Illinois.

Highland avenue, a paved street in the city of Elgin, runs east and west, and is some 35 feet wide from curb to curb. Appellant operates a single track^b street railway in the center of said street. Jackson street runs in a northerly and southerly direction, and crosses Highland avenue practically at right

WILLIAM J. WILLIAMS
Appellant

-vs-

WILLIAM J. WILLIAMS
Appellee

State of Illinois
County of Kane

An action on the case was instituted by appellee against appellant in the circuit court of Kane County to recover for personal injuries and damages to property, resulting from a collision between appellee's automobile and one of appellant's street cars on Highland Avenue, in Moline, Illinois.

The declaration consisted of two counts. The first count charged that appellee was riding with her son in her automobile; that the son was driving said automobile with due care and caution and that, while appellee was in the exercise of due care and caution for her own safety, appellant, through its agent and servant, negligently and recklessly caused one of its cars to run into and strike the automobile of appellee, resulting in the injuries and damages for which this suit is brought. The second count is substantially the same as the first, except it also charges that it was the duty of appellant's servants to keep a careful lookout to avoid running into persons or automobiles lawfully on said street, and a failure to do so. To said declaration, a plea of the general issue was filed. A trial was had resulting in a verdict and judgment in favor of appellee for the sum of \$1,500. To reverse said judgment, this appeal is presented.

Highland Avenue, a paved street in the city of Moline, runs east and west, and is some 25 feet wide from curb to curb. Appellant operates a single track street railway in the center of said street. The street is in a northerly and southerly

angles. Some 300 feet west of Jackson street, Highland avenue is intersected from the south by Lynch street, which runs in a northerly and southerly direction, practically at right angles, and by Mountain street, which enters Highland avenue from the north and east at an angle of about forty-five degrees.

On August 29, 1933, appellee was riding, in company with her son Jack, eighteen years of age, and her daughter Dorothy, sixteen years of age, in a westerly direction on Highland avenue. They were all riding in the front seat of appellee's automobile, the son on the left, in the driver's seat, the daughter on the right and appellee in the center. It had been raining, but the rain had practically stopped. About midway between Jackson and Mountain streets, said automobile collided with one of appellant's street cars, resulting in the damages here sought to be recovered.

It is first contended that appellee failed to prove due care on her own part and on the part of her son, the driver of said automobile.

The testimony on the part of appellee is to the effect that, as they were driving westerly, two automobiles and a truck were parked on the north side of Highland avenue, the truck being the more westerly; that at said time appellee's car was being driven at about twenty miles per hour; that as they approached said cars, the son "turned out into the street car track to pass the parked machines; there was a space between the first machine and the second one, but the truck and second machine were close together. He got by the first car and just as he was passing the second car, * * * I saw the street car coming. * * * My son put his hand out of the open window at the driver's seat and motioned to the operator of the car to kind of hold back a little as he was getting close to us." * * * The street car was getting right on top of us, and he gave the steering wheel an awful jerk like you have to to get a car out of the tracks. Before he could get the back of the car out of the tracks, the street car struck my automobile behind the

...the south by Lynch street, which runs in a
...and by Mountain street, which crosses Highway Avenue from the
north and east at an angle of about forty-five degrees.

...with her son Jack, eighteen years of age, and her daughter Dor-
...sixteen years of age, in a westerly direction on Highway
Avenue. They were all riding in the front seat of Apples's
automobile; the son on the left, in the driver's seat, the
daughter on the right and Apples in the center. It had been
raining, but the rain had practically stopped. About midway
between Jackson and Mountain streets, said automobile collided
with one of Apples's street cars, resulting in the damages
here sought to be recovered.

...the same on her own part and on the part of her son, the driver
of said automobile.

The testimony on the part of Apples is to the effect
that, as they were driving westerly, two automobiles and a truck
were parked on the north side of Highway Avenue, the truck
being the more westerly; that at said time Apples's car was
being driven at about twenty miles per hour; that as they
approached said cars, the son turned out into the street car
lane to pass the same and was struck by said street car
the first machine and the second one, but the truck and second
machine were alone together. He got out the first car and found
as he was passing the second car, "I saw the street car
coming." "My son put his hand out of the open window at
the driver's seat and motioned to the operator of the car to
kind of hold back a little as he was getting close to us." "The
street car was getting right on top of us, and he gave the
steering wheel an awful jerk like you have to do to get a car out
of a jam." Before he could get one back of the car out of
the street car lane my automobile behind the

driver's seat."

Appellee's son testified: "I first saw the street car when I was apposite the second parked car, and it was about fifty feet away from me. The bend in Highland avenue curves to the right. The street car was coming at about thirty miles an hour, and from the time I saw it until we came together I did not notice any difference in the speed. As soon as I saw him, I waved my hand out of the left front window, for him to slow up and honked my horn. As we came together, the automobile was thrown against the curb and the street continued about its full length from the point of the accident". He had further testified that he saw the street car approaching, "I swung the car to the right, and the first time I didn't make it, and by that time I had went about ten feet further, and I swung it again and just got the front wheels out and the street car hit me, right behind the front seat, on the left door."

Louis L. Pinckert testified on behalf of appellant that he was driving the street car in question; that he had stopped at Lynch street and picked up a passenger there; "after the passenger got on, I released the air and gave the controller one point and proceeded easterly on Highland avenue. Just prior to the accident I was traveling nine or ten miles per hour. The accident occurred 120 or 130 feet west of the corner of Jackson street. There was one truck on the north side of Highland avenue between Mountain and Jackson street, parked about one foot from the curb and parallel to it. There were no other cars parked in that block. I first saw the automobile when I was at Lynch street and the automobile was at the turn at Jackson street. " " " The Buick was traveling on the right hand side of the street, west-bound, until it came close to the truck. When it got close to the truck it turned out to avoid the truck and drove with the front and rear wheels on the left side, straddling the street car track. I immediately started pounding my gong and slackening my speed. He continued in the car track about seventy feet after he passed the truck. The truck was about seventy feet east of the point of the crash. About fifty feet away from the truck he

1. 1900 2. 1901 3. 1902 4. 1903 5. 1904 6. 1905 7. 1906 8. 1907 9. 1908 10. 1909 11. 1910 12. 1911 13. 1912 14. 1913 15. 1914 16. 1915 17. 1916 18. 1917 19. 1918 20. 1919 21. 1920 22. 1921 23. 1922 24. 1923 25. 1924 26. 1925 27. 1926 28. 1927 29. 1928 30. 1929 31. 1930 32. 1931 33. 1932 34. 1933 35. 1934 36. 1935 37. 1936 38. 1937 39. 1938 40. 1939 41. 1940 42. 1941 43. 1942 44. 1943 45. 1944 46. 1945 47. 1946 48. 1947 49. 1948 50. 1949 51. 1950 52. 1951 53. 1952 54. 1953 55. 1954 56. 1955 57. 1956 58. 1957 59. 1958 60. 1959 61. 1960 62. 1961 63. 1962 64. 1963 65. 1964 66. 1965 67. 1966 68. 1967 69. 1968 70. 1969 71. 1970 72. 1971 73. 1972 74. 1973 75. 1974 76. 1975 77. 1976 78. 1977 79. 1978 80. 1979 81. 1980 82. 1981 83. 1982 84. 1983 85. 1984 86. 1985 87. 1986 88. 1987 89. 1988 90. 1989 91. 1990 92. 1991 93. 1992 94. 1993 95. 1994 96. 1995 97. 1996 98. 1997 99. 1998 100. 1999 101. 2000 102. 2001 103. 2002 104. 2003 105. 2004 106. 2005 107. 2006 108. 2007 109. 2008 110. 2009 111. 2010 112. 2011 113. 2012 114. 2013 115. 2014 116. 2015 117. 2016 118. 2017 119. 2018 120. 2019 121. 2020 122. 2021 123. 2022 124. 2023 125. 2024 126. 2025 127. 2026 128. 2027 129. 2028 130. 2029 131. 2030 132. 2031 133. 2032 134. 2033 135. 2034 136. 2035 137. 2036 138. 2037 139. 2038 140. 2039 141. 2040 142. 2041 143. 2042 144. 2043 145. 2044 146. 2045 147. 2046 148. 2047 149. 2048 150. 2049 151. 2050 152. 2051 153. 2052 154. 2053 155. 2054 156. 2055 157. 2056 158. 2057 159. 2058 160. 2059 161. 2060 162. 2061 163. 2062 164. 2063 165. 2064 166. 2065 167. 2066 168. 2067 169. 2068 170. 2069 171. 2070 172. 2071 173. 2072 174. 2073 175. 2074 176. 2075 177. 2076 178. 2077 179. 2078 180. 2079 181. 2080 182. 2081 183. 2082 184. 2083 185. 2084 186. 2085 187. 2086 188. 2087 189. 2088 190. 2089 191. 2090 192. 2091 193. 2092 194. 2093 195. 2094 196. 2095 197. 2096 198. 2097 199. 2098 200. 2099 210. 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 25

Appellee's car testified: "I first saw the street car when I was opposite the second parking car, and it was about fifty feet away from me. The bend in Highway Avenue curves to the right. The street car was coming at about thirty miles an hour, and from the time I saw it until we came together I did not notice any difference in the speed. As soon as I saw him, I waved my hand out of the left front window, told him to slow up and looked at him. As we came together, the automobile was thrown against the curb and the street continued about its full length from the point of the accident". He had further testified that he saw the street car approaching, "I swung the car to the right, and the first time I didn't make it, and by that time I had went about ten feet farther, and I swung it again and that got the front wheels out and the street car hit me, hitting behind the front seat, on the left door."

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that he was driving the street car in question; that he had stopped at Fourth Street and picked up a passenger there; that the passenger got on, I released the air and gave the controller the signal and proceeded north on Broadway Street. Just prior to the accident I was traveling nine or ten miles per hour. The accident occurred 130 or 140 feet west of the corner of Jackson Street. There was one track on the north side of Highland Avenue between Mountain and Jackson Street, between about one foot from the curb and parallel to it. There were no other cars running in that block. I first saw the automobile when I was at Fourth Street and the automobile was at the turn at Jackson Street. The car was traveling on the right hand side of the street, west-bound, until it came close to the track. When it got close to the track it turned out to avoid the track and drove with the front and rear wheels on the left side, skidding the street car. I immediately released the air and gave the controller the signal. He continued in the car until about twenty feet past the track. The truck was about seventy feet east of the corner of the street. I saw the car and the truck at the same time.

turned the front wheels out of the track and the back wheels slide around. I was about twenty feet away from him then. I slammed on my emergency brake, which is the highest braking power I have on the car." On cross examination, he further testified: "The driver of the automobile made an effort to get out of the tracks when he was twenty feet from me."

Without going into the evidence in further detail, we hold that it was a question for the jury as to whether or not appellee and the driver of her automobile were in the exercise of due care just prior to and at the time of the collision, and that the court did not err in refusing a new trial on the ground that appellee had not proven due care.

It is next insisted that the court erred in the giving of the tenth, eleventh and fourteenth instructions given on behalf of appellee.

The tenth instruction is as follows:

"The Court instructs the jury that by ordinary care the law means such a degree of care, under the circumstances and in the situation in which the plaintiff was placed at the time; so far as that may be shown by the evidence, if it is so shown, as an ordinary prudent or careful person would exercise under like or similar circumstances."

The court erred in the giving of this instruction, as it did not submit to the jury the question as to whether appellee and the driver of her automobile were in the exercise of due care in driving on the track in question just prior to the time of the collision. *North Chicago S. Ry. Co. v. Cassart*, 203 Ill. 608-612; *Chicago, M. & St. P. R. R. Co. v. Halsey*, 135 Ill. 248-254; *Hale v. Chicago J. Ry. Co.*, 251 Ill. 476-481.

The eleventh instruction directs a verdict, and does not require proof of due care on the part of the driver of said automobile. The declaration averred due care on the part of the driver, as well as on the part of appellee, and in order to recover it was necessary that the proof support said averment.

The court erred in giving the fourteenth instruction

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Without going into the evidence in further detail, we hold that it was a question for the jury as to whether or not appellee and the driver of her automobile were in the vicinity of the scene just prior to and at the time of the collision, and that the court did not err in refusing a new trial on the ground that appellee had not proven due care.

It is respectfully stated that the court erred in the giving of the tenth, eleventh and twelfth instructions given on behalf of appellee.

The tenth instruction is as follows:
"The court instructs the jury that in ordinary cases the fact that a witness is a friend of one of the parties in the situation in which the plaintiff was placed at the time, so far as that may be shown by the evidence, is to be shown, as an element of the case, and is to be considered by the jury as a factor in its deliberations."

The court erred in the giving of this instruction, as it did not advise the jury the question as to whether appellee and the driver of her automobile were in the vicinity of the scene just prior to and at the time of the collision was to be shown, as an element of the case, and is to be considered by the jury as a factor in its deliberations. *North Chicago L. & N. Co. v. Cassady*, 233 Ill. 608-609; *Chicago L. & N. Co. v. Kelley*, 156 Ill. 410-411; *North Chicago L. & N. Co. v. Kelley*, 156 Ill. 410-411.

The eleventh instruction likewise varied, and does not require proof of due care on the part of the driver of the automobile. The instruction advised the jury on the part of the driver, as well as on the part of appellee, and in order to prevent it was necessary that the proof support the statement. The court erred in giving the twelfth instruction.

For the reason that it, like the eleventh instruction, ignored the question of due care on the part of the driver of said automobile, in placing the car in the position that he did, just prior to the collision in question. Said instruction is also erroneous in that it practically assumes negligence on the part of said motorman, instead of submitting to the jury the question of such negligence. It is further erroneous in that it does not require proof on the part of appellee that she herself, just prior to and at the time of said collision, was in the exercise of due care for her own safety and the safety of her property.

For the reasons above set forth, the judgment of the trial court is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

4 AT A TERM OF THE APPELLATE COURT, 7

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 655²

BE IT REMEMBERED, that afterwards, to-wit: On

APR 5 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Edith Smith, et al.
Defendants in Error,

vs.

Edgar J. Smith, et al.,
(Illinois Light & Power Co.)
Plaintiff in Error.

Writ of error to the
Circuit Court of Kankakee
County.

Jett, J.

On December 13, 1919 Edith Smith, Zack B. Smith, Jay B. Smith, Mary E. Dahling and Luther B. Bratton, as Trustee, filed their bill for the partition of certain premises in Kankakee County, making Edgar J. Smith, Ethel G. Christensen and Illinois Light and Power Company, defendants. Service was had and the Illinois Light and Power Company on January 19, 1920 filed its demurrer to the bill. Subsequently and on June 12, 1920 this demurrer was withdrawn and time to answer was extended to July 3, 1920. On that day, on motion of that defendant, time to answer was extended to July 8, 1920. No other orders were taken and nothing further appears to have been done in the case until the May Term, 1926 at which time a Guardian ad litem was appointed for the defendant, Ethel G. Christensen, a person under disability, who filed an answer on her behalf. The other defendants, Illinois Light and Power Company and Edgar J. Smith, having failed to file any answer, were defaulted, a hearing was had and a decree of partition rendered. This decree found that on December 1, 1913 Ethel G. Christensen conveyed her undivided one-fifth interest in the premises to Arthur N. Powers, who on September 21, 1917 conveyed his interest to Illinois Light and Power Company, and that it, Edith Smith, Mary E. Dahling, Jay B. Smith and Zack B. Smith were each the owners of an undivided one-fifth thereof. Commissioners were appointed, who reported the premises indivisible and on August 7, 1926 a decree of sale was rendered. On the same day the Illinois Light and Power Company moved the Court to vacate the decree of partition and on August 14th filed its written petition in which it alleged that on February 28, 1908, Edgar J. Smith, surviving husband of Grace Edith Smith, deceased, Ethel

Defendants in Error, et al.

Writ of error to the

vs.

Illinois Court of Appeals
County.

Edgar J. Smith, et al.,
(Illinois Light & Power Co.)
Plaintiffs in Error.

1930, 1.

On December 11, 1929, Edgar J. Smith, et al.,

Mary E. Dahling and Arthur B. Bratton, as Trustees, filed their bill

for the partition of certain premises in Kansas County, making

Edgar J. Smith, Ethel G. Christensen and Illinois Light and Power

Company, defendants. Service was had and the Illinois Light and

Power Company on January 19, 1930 filed its demurrer to the bill.

Independently and on June 19, 1930 this demurrer was withdrawn and

time to answer was extended to July 3, 1930. On that day, on mo-

tion of that defendant, time to answer was extended to July 8, 1930.

No other orders were taken and nothing further appears to have been

done in the case until the May Term, 1930 at which time a Guardian

ad litem was appointed for the defendant, Ethel G. Christensen, a per-

son under disability, who filed an answer on her behalf. The other

defendants, Illinois Light and Power Company and Edgar J. Smith,

having failed to file any answer, were defaulted, a hearing was had

and a decree of partition rendered. This decree found that on De-

cember 1, 1913 Ethel G. Christensen conveyed her undivided one-

fifth interest in the premises to Arthur W. Powers, who on Septem-

ber 21, 1917 conveyed his interest to Illinois Light and Power Com-

pany, and that it, Edgar J. Smith, Mary E. Dahling, Jay B. Smith and

Edgar J. Smith were each the owners of an undivided one-fifth interest.

Commissioners were appointed, who reported the premises indivis-

ible and on August 7, 1925 a decree of sale was rendered. On the

same day the Illinois Light and Power Company moved the Court to

vacate the decree of partition and on August 14th filed its written

petition in which it alleged that on February 29, 1908, Edgar

J. Smith, surviving husband of Grace Smith Smith, deceased, filed

G. Christensen, Mary E. Dahling, Jay B. Smith and Zack B. Smith, children of the said Grace E. Smith, entered into a certain contract in writing with Wallace H. Warner, by the terms of which they agreed to sell and convey to him by Warranty Deed on or before March 10, 1909 for \$3500.00 cash the land described in the partition decree: that this contract further provided that in the event Warner or his assigns should on December 1, 1908, notify Ethel G. Smith (now Christensen) and Mary E. Smith (now Dahling) or their solicitor, in writing of their intention to complete the purchase and deposit \$300.00 with the First National Bank of Wilmington to be applied upon costs and solicitor fees, that then the Smiths would proceed with all reasonable haste and diligence to perfect the title to the property by commencing at the January Term, 1909 proceedings for the partition and sale of said premises. The petition then alleges that said Warner subsequently assigned this agreement to Arthur N. Powers and he, for a valuable consideration, assigned all his right, title and interest therein to petitioner: that Arthur N. Powers, pursuant to the terms of said agreement, paid E. B. Gower, an attorney, \$300.00 for legal services rendered by him in correcting the title to the premises: that this payment was beneficial to all the parties in interest, and that petitioner, as assignee of Powers, is entitled to be reimbursed for said payment out of the proceeds of said sale; that Powers also on May 15, 1915 paid Zack B. Smith \$300.00 as a portion of the purchase price of said premises, and on August 3, 1915 paid him the further sum of \$50.00 and on November 18, 1915 paid him an additional \$300.00, and that in equity petitioner, as assignee, is entitled to have paid to it said amounts, aggregating \$620.00, from the distributive share of Zack B. Smith. The petition prayed ~~frank~~ that the said sum of \$300.00 so advanced to perfect the title, together with interest, should be ordered deducted pro rata from the share of all the parties to the suit, and paid to it, together with the further sum of \$620.00 to be deducted from the share of Zack B. Smith, and that Luther B. Bratton, who has been in possession of the land and has collected the rents for a long period of time, should account for such rents from the time petitioner became the owner of an undivided one-fifth of the premises to the date of the sale.

Christensen, Mary E. Smith, and John H. Smith, who were the owners of the said premises, executed and acknowledged the foregoing instrument.

That in writing with Wallace H. Warner, by the terms of which they agreed to sell and convey to him by warranty deed on or before March 10, 1908 for \$2500.00 and the same was recorded in the

recording office; that this contract further provided that in the event Warner or his assigns should on December 1, 1908, notify

Etzel G. Smith (now Christensen) and Mary E. Smith (now Smith) at their solicitor, in writing of their intention to complete the

purchase and deposit \$500.00 with the First National Bank of Wilmington to be applied upon costs and solicitor fees, that then the Smiths would

proceed with all reasonable haste and diligence to perfect the title to the property by commencing at the January Term, 1908 proceedings

for the partition and sale of said premises. The petition then alleges that said Warner subsequently assigned this agreement to Arthur W.

Powers and he, for a valuable consideration, assigned all his right, title and interest therein to petitioner, Etzel G. Smith, who

came to the terms of said agreement, paid E. B. Gover, an attorney, \$100.00 for legal services rendered by him in contesting the title

to the premises; that this payment was beneficial to all the parties in interest, and that petitioner, as assignee of Powers, is entitled

to be reimbursed for said payment out of the proceeds of said sale; that Powers also on May 15, 1912 paid Etzel G. Smith \$500.00 as a

portion of the purchase price of said premises, and on August 8, 1912 paid him the further sum of \$20.00 and on November 18, 1912 paid him

an additional \$500.00, and that in equity petitioner, as assignee, is entitled to have paid to it said amounts, aggregating \$820.00.

That the distributive share of Etzel G. Smith. The petition prays that the said sum of \$820.00 be advanced to perfect the title

together with interest, should be ordered deducted out of the proceeds of the sale of all the parties to the suit, and paid to it, together with the

sum of \$820.00 to be deducted from the share of Etzel G. Smith, who has been in possession of the

premises and collected the rents for a long period of time, should be paid to the parties from the time petitioner became the owner

of the premises on the date of the execution of the deed of sale.

Edith Smith answered the petition, admitting that she was the owner of an undivided one-fifth of said premises, but states that she was not a party to the agreement dated February 29, 1908, had no information regarding it, and avering that it could not in any way affect her share of the proceeds of the sale.

Mary E. Dahling and Jay B. Smith by their answer neither admit or deny that they signed the alleged contract, but aver that they know nothing about the payment by Powers to Gower of \$300.00, and insist that if such sum was paid, it was paid without their knowledge or consent, and that the title was not perfected or any thing done by Powers, Gower or by any one else, which was in any way beneficial to the title.

Zack B. Smith by his answer states that he was not a party to the alleged agreement, and therefore can not be bound thereby: that he knows nothing of the payment to Gower of ~~\$2000.00~~ \$300.00 and denies that Powers paid him \$300.00 on May 15, 1915, or the further sum of \$300.00 on November 18, 1915, and denies that petitioner is entitled to have \$620.00 and interest deducted from his distributive share, and insists that if any payments have been made, they are barred by the Statute of Limitations.

On March 1, 1928 the cause was heard by the Chancellor, and a decree was rendered, finding that on February 29, 1908 Jay B. Smith, Zack B. Smith and Edith Smith were infants, and the contract of that date was not binding upon them; that neither Wallace H. Warner, Arthur H. Powers or petitioner ever notified Ethel G. Smith or Mary E. Smith or their solicitor in writing of their intention to complete the purchase of the property as provided in said contract: that Arthur H. Powers deposited \$300.00 in the First National Bank of Wilmington to the credit of that Bank, but not to the credit of any of the Smith heirs, and that said deposit was not made pursuant to the contract and was subsequently paid to E. B. Gower without any authority from the defendants in error or any of them: that if any services were rendered by Judge Gower, the value thereof was lost to defendants

that the value thereof was lost to defendant in error or any of them; that if any services were subsequently paid to H. B. Gower without any authority from the bank, that said deposit was not made pursuant to the contract and was not to the credit of any of the Smith heirs, and that \$500.00 in the First National Bank of Wilmington to the credit of H. B. Gower in said contract; that Arthur H. Powers deposited at their intention to complete the purchase of the property and that G. Smith or Mary E. Smith or their solicitor in writing witness H. Gower, Arthur H. Powers or defendant with an intent contract of that date was not binding upon them; that neither Jay H. Smith, Zack B. Smith and Edith Smith were insane, and the and a decree was rendered, finding that on February 29, 1908, On March 1, 1908 the cause was heard by the Chancellor, have been made, they are barred by the Statute of Limitations. from his distributive share, and insists that if any payments petitioner is entitled to have \$280.00 and interest between further sum of \$800.00 on November 18, 1912, and denies that and denies that Powers paid him \$200.00 on May 18, 1912, or the that he knows nothing of the payment to Gower of \$200.00 \$200.00 to the alleged agreement, and therefore can not be bound thereby; Zack B. Smith by his answer stated that he was not a party was in any way connected with the title.

in error by reason of the delays occasioned by Powers and the defendants in error were put to the additional expense of the later partition suit: that whether the rights of the parties be controlled by the original contract or by an extension thereof, the petitioner is not entitled to recover the \$300.00 paid to Gower: that the contract was assigned by Warner to Powers on April 4, 1908 and by Powers assigned to petitioner in 1914, and that therefore if Powers paid Zack B. Smith during 1915 any sums of money, petitioner can not claim credit therefor; and can not recover any sum so paid by Powers to Smith because such payments are barred by the Statute of Limitations, and petitioner and Smith were not tenants in common at the time the alleged payments were alleged to have been made. The petition was therefore dismissed, and from that order and decree, the Illinois Light and Power Company has sued out a Writ of Error and brings the record to this court for review.

The record discloses that in pursuance to the provisions of the decree of sale, the Master sold the property for \$16,988.00, and his report of sale was approved on November 27, 1926, and a partial distribution ordered. On February 22, 1927 by agreement of all the parties, a further partial distribution was ordered and the report of the trustee was approved, except as to two items aggregating \$100.00, for which the trustee sought credit, he having paid that amount to Ethel G. Christensen. Under the order entered at that time the court reserved these two items for a further hearing.

From the evidence, it appears that prior to 1908 Arthur H. Powers and Wallace H. Warner, acting on behalf of the plaintiff in error, made numerous efforts to purchase the Smith land, the title to which was in Luther B. Bratton as trustee for Ethel Christensen, Mary E. Dahling, Jay B. Smith, Zack B. Smith and Edith Smith, Surviving children of Grace Edith Smith, deceased: that on February 29, 1908 Warner entered into the written agreement with Edgar J. Smith, surviving husband of Grace Edith Smith, Ethel Christensen, Mary E. Dahling, Jay B. Smith and Zack B. Smith

in error by reason of the delay occasioned by Powers and the
defendants in error were put to the additional expense of the
later partition suit; that whether the rights of the parties be
controlled by the original contract or by an extension thereof,
the partition is not binding as against the trust until it is
Gower: that the contract was assigned by Warner to Powers on
April 4, 1908 and by Powers assigned to petitioner in 1914, and
that thereafter it became part of a chain of title and was
of money, petitioner can not claim credit therefor; and can not
recover any and no paid by Powers to Smith because such payments
are barred by the statute of limitations, and petitioner and Smith
were not tenants in common at the time the alleged payments were
alleged to have been made. The petition was therefore dismissed,
and from that order and decree, the Illinois State and Power
Company has sued out a writ of error and brings the record to
this court for review.

The record discloses that in pursuance to the provisions of
the Act of 1892, the State and Power Company was organized in 1901,
and its report of sale was approved on November 27, 1903, and a
partial distribution ordered. On February 22, 1904, an agreement
of all the parties, a further partial distribution was ordered
and the report of the trustee was approved, except as to two
items aggregating \$100.00, for which the trustee sought credit,
he having paid that amount to Ephel G. Christensen. Under the
order entered at that time the court reserved these two items for
further review.

It is to be noted, as appears from the report of the trustee,
Powers and Wallace M. Warner, acting on behalf of the plaintiff
in error, made numerous efforts to purchase the Smith land, the
title to which was in Ephel G. Christensen as trustee for Ephel
Christensen, Mary W. Darling, Jay M. Smith, Jack M. Smith and
other heirs, resulting in some minor sales, but no purchase was
made on February 22, 1904 Warner entered into the written agree-

set forth in the petition of plaintiff in error. The original contract was not produced upon the hearing but a carbon copy thereof was, and Warner testified that the original was signed in Judge Gower's office and left there, although he is of the opinion it was finally placed for safe keeping with the First National Bank at Wilmington. Arthur M. Powers testified as to its execution, and it was his recollection that Judge Gower was directed to send it to this Bank. At the time of the execution of this contract, Jay B. Smith was seventeen years of age, Zack B. Smith was fourteen, and ~~With~~ Edith Smith was also a minor. The contract itself recites that three of the heirs were minors.

On December 1, 1908 at the direction of Powers, the account of the First National Bank of Wilmington with the First National Bank of Chicago was credited with \$300.00, and the Wilmington Bank advised of that fact. On June 14, 1909 Powers directed the Wilmington Bank to pay Judge Gower this \$300.00, which it did, and it is this sum which plaintiff in error is seeking to reach in this proceeding. It further appears that Judge Gower, a practicing attorney living in Kankakee, prepared a bill on behalf of Ethel Smith and Mary Smith for the partition of these premises, and this bill was filed on December 23, 1908, but no proceedings were had thereunder, and it was dismissed by the complainants at their costs on December 1, 1913, Judge Gower testifying that it was his recollection that it was dismissed because of the inability to satisfy ourselves that the place would sell for what it was worth. We had no bidder that we knew would bid what the heirs thought was the value of the property. I talked to Mr. Powers a number of times between the time the negotiations first began, and the time of the dismissal of the suit, and my memory is that the delay in bringing the case to trial and the effort to get a decree for sale was at the request of Mr. Powers. He gave as his reason that he wasn't ready".

Plaintiff in error is seeking by its petition, to have paid to it out of the funds remaining in the hands of the Master derived from the sale of this land, first the sum of \$300.00 to-

The original petition of plaintiff in error. The original
 was not produced upon the hearing but a carbon copy
 thereof was, and former testified that the original was signed
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 to the execution, and it was his recollection that Judge Gower
 was directed to send it to this bank. At the time of the exe-
 cution of this contract, Ray B. Smith was seventeen years of age,
 Mack B. Smith was fourteen, and Ethel Smith was also a
 minor. The contract itself recites that three of the heirs were
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 On December 1, 1908 at the direction of Powers, the account
 of the first National Bank of Wilmington with the Chicago Bank
 of Chicago was credited with \$300.00, and the Wilmington Bank
 advised at that time. On June 12, 1915, Judge Gower directed the
 Wilmington Bank to pay Judge Gower this \$300.00, which it did,
 and it is this sum which plaintiff in error is seeking to recover
 in this proceeding. It further appears that Judge Gower, a
 practicing attorney living in Kansas, prepared a bill on behalf
 of Ethel Smith and Mary Smith for the partition of these premises,
 and this bill was filed on December 22, 1908, but no proceedings
 were had thereunder, and it was dismissed by the complainants
 at their costs on January 1, 1915. Judge Gower testifies that
 it was his recollection that it was dismissed because of the
 "inability to satisfy ourselves that the place would sell for what
 it was worth. We had no bidder that we knew would bid what the
 heirs thought was the value of the property. I talked to Mr.
 Powers a number of times between the time the negotiations first
 began, and the time of the dismissal of the suit, and my memory
 is that the delay in bringing the case to trial was due to the
 fact that the heirs lost the case at the trial of the first
 trial.
 Plaintiff in error is seeking by the petition, to have paid
 to it out of the funds remaining in the hands of the Master be-

gether with interest thereon from June 14, 1909, being the date it directed the payment of that amount to Judge Gower. The petition alleges that this amount was advanced by it to perfect the title to the premises, and was for legal services rendered for the use and benefit of all the parties to this cause, and that in equity said sum and interest should be deducted pro rata from the share of all the parties to this suit. It is seeking this recovery because of the provisions of the contract of February 29, 1908. Edith Smith was not a party to that contract, and can not be bound thereby. Zack B. Smith and Jay B. Smith were minors at the time of its execution. The contract provided that if Warner notified Mary E. Smith on December 1, 1908 in writing of his intention to complete the purchase he should deposit \$300.00 with the First National Bank of Wilmington to be paid to the Smith heirs who signed the contract or to their solicitor when the sale of the premises is had. No written notice was given Mary E. Smith as in the contract provided. The title to the premises was not perfected, and the partition proceeding instituted on December 23, 1908 by Ethel Smith and Mary E. Smith never went to a sale but was dismissed five years later. This suit was in fact controlled by plaintiff in error, and this \$300.00 was paid to Judge Gower by plaintiff in error for his services in instituting that proceeding. The payment was not in accordance with the provisions of the contract, and it would be inequitable to require any portion of this \$300.00 to be deducted from the distributive share of any of the defendants in error and the Chancellor correctly so held.

The plaintiff in error is further seeking to have paid to it out of the distributive share of Zack B. Smith the sum of \$620.00 and interest thereon. Arthur N. Powers testified that he made three payments to Smith, and at the time the payments were made Smith and his wife promised to execute a deed for their interest in the premises. All the payments were made in currency, the first one of \$300.00 on May 15, 1915 at the Illinois Central Station, the second of \$20.00 on August 30, 1915, and the last one at the

with interest thereon from June 1st, 1909, being the date
of the payment of that amount to Judge Gower. The pay-
ment alleged that this amount was advanced by it to perfect the
title to the premises, and was too small to be of any
use and benefit of all the parties to this cause, and that in
equity said sum and interest should be deducted pro rata from the
share of all the parties to this suit. It is seeking this recovery
because of the provisions of the contract of February 20, 1908.
Edith Smith was not a party to that contract, and can not be
bound thereby. Mack B. Smith and Mary E. Smith were minors at the
time of its execution. The contract provided that it was to be
signed by Mary E. Smith on December 1, 1908 in writing of his inten-
tion to complete the purchase he should deposit \$200.00 with the
Trust National Bank of Wilmington to be paid to the Smith heirs
who signed the contract or to their solicitor when the sale of
the premises is had. No written notice was given Mary E. Smith
as in the contract provided. The title to the premises was not
perfected, and the partition proceeding instituted on December
28, 1908 by Ethel Smith and Mary E. Smith never went to a sale
but was dismissed five years later. This suit was in fact con-
trolled by plaintiff in error, and this \$200.00 was paid to Judge
Gower by plaintiff in error for his services in instituting that
partition. The payment was not in accordance with the provisions
of the contract, and it was of no benefit to any of the parties
portion of this \$200.00 to be deducted from the distributive
share of any of the defendants in error and the appellees correct-
ly so.
The plaintiff in error is further seeking to have paid to
it out of the distributive share of Mack B. Smith the sum of \$250.00
and interest thereon. Arthur E. Powers testified that he made
three payments to Edith, and at the time the payments were made
Edith and his wife promised to execute a deed for their interest
in the premises. All the payments were made in currency, the first
was \$250.00 on May 15, 1915 at the Illinois Central Station,
the second of \$100.00 on August 30, 1915, and the last one at the

LaFayette Hotel in Kankakee on November 18, 1915. Receipts purporting to have been executed by Smith were introduced in evidence. Zack B. Smith admitted that he received \$20.00 from Powers, but insisted that it was a loan, and that nothing was said about the farm. He identified the receipt for this amount as bearing his signature, but contends that the statement on it to the effect that it was a part of his share of the purchase price of the premises involved in this proceeding was not on the receipt when he signed it. At the time the first \$300.00 receipt is dated, he insists that he was not in Kankakee, ~~but was not in Kankakee~~, but was employed as a cook at the Anna State Hospital, and was never at the LaFayette Hotel with Powers, and denies that he ever received either of the \$300.00 payments and denies that he ever executed the receipts therefor. As to his employment at Anna and his testimony that he was not in Kankakee at the time the first \$300.00 payment is alleged to have been made, he is corroborated by his sister Edith, Luther B. Bratton and Mary E. Sartwell, former matron and now dietitian and housekeeper at the Anna State Hospital whose record disclosed that on May 15, 1915, Zack Smith was on duty at the institution. In rebuttal James I. Ennis, an expert in disputed handwritings testified that in his opinion the same party executed all three receipts.

We have read this record with care. The question involved in one of fact, and we are not impressed with the position assumed by plaintiff in error. Powers assigned all his interest in the contract under which plaintiff in error claims in 1914. After 1914 Powers had no interest in the contract, but had in December 1913 acquired the interest of Ethel Christensen to the premises. On September 21, 1917 he conveyed his interest to plaintiff in error. At the time, therefore, that these payments, aggregating \$620.00, were made plaintiff in error and Zack B. Smith were not tenants in common and if not the Statute of Limitations may be successfully invoked by Smith, and if any sums were paid by Powers to Smith in 1915, plaintiff in error can not ~~he~~ recover the same in this proceeding.

Exhibits were introduced in evidence on November 10, 1914, and the court
found that the receipt was not a receipt for the \$200.00 loan, but
that it was a loan, and that nothing was said about the
loan. He identified the receipt for this amount as bearing his
signature, but contends that the statement on it is the effect
that it was a part of his share of the purchase price of the pro-
perties involved in this proceeding was not on the receipt when he
signed it. At the time the first \$200.00 receipt is dated, he
insists that he was not in Kansas, but was not in Kansas,
but was employed as a cook at the Anna State Hospital, and was
never at the Lafayette Hotel at St. Louis, and denies that he ever
received either of the \$200.00 payments and denies that he ever
executed the receipt therefor. As to his employment at Anna
and his residence from the time he was in Kansas at the time the first
\$200.00 payment is alleged to have been made, he is contradicted
by his sister Edith, Father B. Keaton and Mary E. Sandwell, former
nurses and now dietitian and housekeeper at the Anna State Hospital
whose record disclosed that on May 15, 1913, each sister was on
duty at the institution. In rebuttal James I. Lewis, an expert
in disputed handwriting testified that in his opinion the two
receipts executed all were made by the same person.
We have read this record with care. The question involved
in one of fact, and we are not impressed with the position assumed
by plaintiff in error. Powers assigned all his interest in the
contract under which plaintiff in error claims in 1914. After
1914 Powers had no interest in the contract, but had in December
1913 assigned the interest of Michael Christensen to the plaintiff.
On September 21, 1917 he conveyed his interest to plaintiff in
error. At the time, therefore, that these payments, and the
\$200.00, were made plaintiff in error and Jack E. Smith were not
tenants in common and it was the estate of Michael Christensen who
was the plaintiff in error, and if any claim were made by
Powers to Smith in 1913, plaintiff in error can not recover the
same in this proceeding.

The Chancellor saw and heard the witnesses. His decree is supported by the evidence, and we are not disposed to interfere with his finding. The decree of the Circuit Court of Mankakee County is therefore affirmed.

Decree affirmed.

For Commission now and here the witnesses. His George is
represented by his evidence, and we are not disposed to interfere
with it. The George of the Circuit Court of Tennessee
County is therefore affirmed.
George affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

5
AT A TERM OF THE APPELLATE COURT, A

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in the year of our Lord one thousand nine hundred and thirty, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: On

APR 5 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



Paul Pinter :
:
appellee, :
:
vs. : Appeal from the Circuit Court
: of Will County.
Joseph Melnar :
:
appellant :

Jett:1

Paul Pinter, appellee, instituted this suit in the circuit court of Will County, against Joseph Melnar, appellant to recover wages for services claimed to be due him.

The declaration consists of the common counts. To the declaration, the appellant pleaded the general issue, and filed a special plea, alleging that at the time of the supposed hiring, appellee was in ill health and unable to perform any labor and continued in such condition during the time he remained with appellant; that appellee, for two years after he came to live with appellant, received from Croation Federal Union \$20.00 a month, sick benefit, and that appellant furnished him money from time to time, amounting to \$55.00 to pay dues in said society, and additional sums to the amount of \$45.00 for other purposes; that appellant furnished appellee with a good home, including board, room and laundry, and that appellee at no time, was able to perform any services.

A jury trial was had resulting in a verdict for appellee in the sum of \$800.00; motion for a new trial was filed, denied and judgment rendered on the verdict for said sum, and it is from said judgment that the appellant prosecuted this appeal.

The principal ground relied upon for a reversal of the judgment is that the verdict of the jury is against the manifest weight of the testimony. It is the contention of appellee that he was employed by appellant and worked for him off and on for a period of three and one half years, and that he had not been paid for his services.

Paul Winter, appellee, appellant
 Joseph Meiner, appellee
 Appeal from the Circuit Court
 of Will County.

Left:

Paul Winter, appellee, instituted this suit in the circuit court of Will County, against Joseph Meiner, appellant to recover wages for services claimed to be due him.

The declaration consists of the common counts.

To the declaration, the appellant pleaded the general issue,

and filed a special plea, alleging that at the time of the

supposed hiring, appellee was in ill health and unable to

perform any labor and continued in such condition during the

time he remained with appellant; that appellee, for two years

after he came to live with appellant, received from Christian

Federal Union \$20.00 a month, sick benefit, and that appellee

turned him money from time to time, amounting to \$25.00.

to pay dues in said society, and additional sums to the amount

of \$45.00 for other purposes; that appellant furnished appellee

with a good home, including board, room and laundry, and that

appellee at no time, was able to perform any services.

A jury trial was had resulting in a verdict for

appellee in the sum of \$800.00; motion for a new trial was

granted and judgment rendered on the verdict for said sum,

and it is from said judgment that the appellant presented this

appeal.

The principal ground relied upon for a reversal

of the judgment is that the verdict of the jury is against the

manifest weight of the testimony. It is the contention of

appellee that he was employed by appellant and worked for him

for two or three years, and that

he had not been paid for his services.

Appellant insists that appellee was living as a member of his family; that he was in ill health; unable to work to any considerable extent; that he had been receiving sick benefit under a benefit policy; that appellant had from time to time paid out sums of money on said policy, and for clothing for appellee, and that he did not owe appellee any sum or sums of money for wages.

The record discloses that appellee had stayed in appellants home three and one half years; that at the time he left the home of appellant some difficulty had occurred between him and appellant, and it is contended by appellant that that is the first time appellee had made any demand on him for wages. Paul Pinter, appellee, for twenty-nine years worked as a miner, and in the year 1925, while afflicted with heart trouble, went to the home of a man by the name of Plese, in Joliet, Illinois, to live. A member of the family of Plese having the small pox, he then went to the home of appellant, his cousin, and after remaining there about three weeks he decided to return to the home of Plese where he intended to work.

Appellant had been operating a soft drink parlor in Joliet, and the city had refused to give him a license. Appellant asked appellee to remain with him, requesting him in his name, to obtain from the city of Joliet a license, so he could continue in business.

In consideration of appellee's obtaining such license in his name, appellant promised ~~in~~ him to pay appellee for whatever services he would render. Appellee, relying upon the promise of appellant went to the City Hall of Joliet and obtained a license in his name, thus enabling appellant to continue in business, and thereafter worked for appellant for three years and three months.

Appellee being unable to clearly speak the English language made the following statement, "Melnar he say prefer me; he would give me board, clothes and expenses; I would be able to work some; he didn't say how much he would give me and I didn't say; he would give me so much what would be right; this is reason I stayed; that is reason I give my name license."

Appellant insists that appellee was living as a member of his family; that he was in ill health; unable to work as any considerable extent; that he had been receiving sick benefits under a benefit policy; that appellee had from time to time paid out sums of money on said policy, and for clothing for appellee, and that he did not owe appellee any sum or sums of money for same.

The second business that appellee had stayed in appellant's home some time and one half years; that at the time he left the home of appellant some difficulty had occurred between him and appellant, and it is contended by appellant that it is the first time appellee had made any demand on him for wages. That printer, appellee, for twenty-nine years worked as a minor, and in the year 1911, while residing with appellant, went to the home of a man by the name of Pless, in Joliet, Illinois, to live. A member of the family of Pless having the small box, he then went to the home of appellant, his cousin, and after remaining there about three weeks he decided to return to the home of Pless where he was to live.

Appellant had been operating a wolf drink parlor in Joliet, and the city had refused to give him a license. Appellant asked appellee to remain with him, requesting him in his name, to obtain from the city of Joliet a license, so he went to Joliet to obtain same.

In consideration of appellee's obtaining such license in his name, appellant promised him to pay appellee for what ever services he would render. Appellee, relying upon the promise of appellant went to the City Hall of Joliet and obtained a license in his name, thus enabling appellant to continue in business, and thereafter worked for appellant for three years and three months. Appellee being unable to clearly speak the English language made the following statement, "Kelman he say proper as; he would give me board, clothes and expenses; I would be able to work some; he didn't say we would be able to do as I like; and; he would give me no more what would be right; this is reason I wouldn't stay in reason I give my name license."

The evidence further shows that some days appellee worked five hours a day, and others, from morning until night, and on one occasion while appellant attended a convention at Cleveland, for three weeks appellee worked from seven o'clock in the morning until mid-night, waiting on customers, cashing workman's checks, and attending the the business in general as if it were his own.

Appellee also testified that while he was working for appellant, appellant did not buy him any clothes; that his work was worth fifty cents an hour, but he was only charging twenty-five cents per hour. Some two or three witnesses who had been customers at appellant's place of business, testified in corroboration of appellee, that they had seen him working in and about appellant's place of business. During the month of March, 1928, appellee demanded his money; appellant refused to pay him and appellee left him.

The evidence on the part of appellant tends to prove the matters and things set forth in his special plea. The evidence is conflicting. This record presents a case that ~~was~~ was peculiarly one for a jury to pass upon. The verdict of the jury will not be lightly disturbed and will not be set aside where the evidence is conflicting, even though it may seem to be against the weight of the evidence unless it is apparent the jury have been actuated by passion and prejudice. *Miller vs. Balthasser*, 78 Ill. 306; *C. B. & Q. Railroad Company vs Lee, Administrator*, 87 Ill. 454; *City of Rock Island vs. Deis*, 38 Ill. App. 409.

The evidence on the part of appellee, standing alone, clearly authorizes a recovery in his behalf. The rule is that where the evidence of one party is clearly sufficient to support a verdict, the verdict will not be disturbed on the ground that the evidence was conflicting. *Chesney vs. U. P. Railway Company* 209 Ill. App. 494; *Alton Railway Gas & Electric Company vs. Seiferth*, 95 Ill. App. 134. The function of the jury is to pass on questions of fact. This function is not to be invaded on a motion for new trial on the ground that the preponderance of the evidence does not

The evidence further shows that some days appellee

worked five hours a day, and others, from morning until night, and on one occasion while appellee attended a convention at Cleveland, for three weeks appellee worked from seven o'clock to the middle of the night, and during the business in general as workman's check, and attending the business in general as it were his own.

Appellee also testified that while he was working

for appellee, appellee did not pay him any clothes; that his work was worth fifty cents an hour, but he was only earning twenty-five cents per hour. Some two or three witnesses who had been customers at appellee's place of business, testified in corroboration of appellee, that they had seen him working in and about appellee's place of business. During the month of March, 1928, appellee demanded his money; appellee refused to pay him and appellee left him.

The evidence on the part of appellee tends to

prove the matters and things set forth in his special plea. The evidence is conflicting. This record presents a case that was peculiarly one for a jury to pass upon. The verdict of the jury will not be lightly disturbed and will not be set aside where the evidence is conflicting, even though it may seem to be against the weight of the evidence unless it is apparent the jury have been motivated by passion and prejudice. Miller vs. Administrator, 37 Ill. 303; C. & N. Railroad Company vs. Lee, Administrator, 37 Ill. 454; City of Rock Island vs. Davis, 38 Ill. App. 409.

The evidence on the part of appellee, standing alone,

does not establish a recovery in its favor. The evidence is conflicting and the verdict will not be disturbed on the ground that the evidence was conflicting. Cheney vs. U. S. Railway Company, 309 Ill. App. 404; Alton Railway Co. vs. Illinois Company, 309 Ill. App. 134. The function of the jury is to pass on questions of fact. This function is not to be disturbed on a motion for judgment on the ground that the preponderance of the evidence does not

sustain the verdict. *Monahan vs. Met. Life Ins. Co.* 207 Ill. App. 200-208; *Offutt vs. Columbian Exposition*, 175 Ill. 472-475.

It cannot be said that the verdict of the jury is against the manifest weight of the testimony. If the jury believed the testimony of appellee, they were authorized to find as they did on the question of fact.

Appellant also insists that the court erred in giving appellee's third instruction, which reads as follows:-
"The Court instructs you, that when one person labors for another, with his knowledge and consent, and the latter voluntarily takes the benefit of such labor, then the law will presume that the laborer or employee is to be paid for his labor unless the contrary is shown by the evidence; and if no special contract is provided fixing the price, then the laborer or employee is entitled to have what his services are reasonably worth."

While this instruction is probably not as carefully guarded as it should have been, in connection with the facts in the case, we are not prepared to say that the giving of such instruction constituted reversible error.

Appellant also urges that the court erred in refusing to give instructions 12 and 13, offered by him. An examination of these instructions discloses the fact that so far as they state correct principles of law, they were substantially covered by other instructions, given on behalf of appellant.

The assignment of errors also raises the question of the verdict being excessive; this assignment does not appear to have been argued by the appellant except in a general way. In reply to this suggestion however, it is only necessary to say that if the jury believed the testimony of appellee, it could not be said with any degree of success, that the verdict on which judgment was rendered, was excessive.

We conclude therefore, that the appellant has had a fair trial; the questions of fact having been presented to a jury and the jury having found against him, and there being no reversible error in the giving or refusing of instructions, the

contains the verdict. Honorable vs. West. Life Ins. Co. 100 Ill. app.
100-101; Cline vs. Columbia Exposition, 175 Ill. 473-475.

It cannot be said that the verdict of the jury is
against the manifest weight of the testimony. If the jury be-
lieved the testimony of appellee, they were authorized to find
as they did on the question of law.

Appellant also insists that the court erred in
giving appellant's instructions, which were as follows:

"The Court instructs you, that when one person labors for another,
with his knowledge and consent, and the latter voluntarily agrees
the benefit of such labor, then the law will presume that the
laborer or employee is to be paid for his labor unless the contrary
is shown by the evidence; and if no special contract is provided
fixing the price, then the laborer or employee is entitled to
have what his services are reasonably worth."

While this instruction is probably not as generally
framed as it should have been, in connection with the facts in
the case, we are not prepared to say that the giving of it in
instruction constituted reversible error.

Appellant also urges that the court erred in re-
fusing to give instructions 12 and 13, offered by him. An examina-
tion of these instructions discloses the fact that so far as they
state correct principles of law, they were substantially covered
by other instructions, given on behalf of appellee.

The assignment of error also raises the question
of the verdict being excessive; this assignment does not appear
to have been stated by the appellant except in a general way.
In reply to this suggestion however, it is only necessary to say
that if the jury believed the testimony of appellee, it would
not be said with any degree of accuracy, that the verdict on which
judgment was rendered, was excessive.

We conclude therefore, that the appellant has not
shown that the questions of fact having been presented to a
jury and the jury having found against him, and there being no
manifest error in the giving or refusing of instructions, the

judgment of the circuit court of Will County will be affirmed.

Judgment affirmed.

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

REPORT OF THE
COMMISSIONERS OF THE
UNIVERSITY OF CHICAGO
FOR THE YEAR 1900

CHICAGO: THE UNIVERSITY OF CHICAGO PRESS
1901

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

REPORT OF THE
COMMISSIONERS OF THE
UNIVERSITY OF CHICAGO
FOR THE YEAR 1900

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THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

REPORT OF THE
COMMISSIONERS OF THE
UNIVERSITY OF CHICAGO
FOR THE YEAR 1900

CHICAGO: THE UNIVERSITY OF CHICAGO PRESS
1901

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

1
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 655^u

BE IT REMEMBERED, that afterwards, to-wit: On

APR 11 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

THE PEOPLE OF THE STATE OF :
ILLINOIS :
 :
Deft. in Error :
 :
vs. :
 :
H. R. WINCHESTER, :
 :
Pltf. in Error :

SECTION TO THE COUNTY
COURT OF LEE COUNTY.

February Term, 1930.

Jett: J.

The State's Attorney of Lee County filed an information in the county court against H. R. Winchester, plaintiff in error, consisting of two counts. The first count charged the plaintiff in error with the unlawful possession, for the purpose of sale, of intoxicating liquor without having a permit from the Attorney General of the State of Illinois to possess such liquor.

In the second count it is charged that the plaintiff in error unlawfully and knowingly, sold intoxicating liquor for beverage purposes, which said intoxicating liquor then and there contained more than one half of one per cent of alcohol by volume, and was then and there fit for use for beverage purposes, without having a permit from the Attorney General of the State of Illinois to sell such liquor.

The information was signed and filed by Mark C. Keller, State's Attorney, but was not verified by him. Appended to the information was the affidavit of one L. P. Brooker, which verification is as follows:- "State of Illinois, Lee County, SS.

L. P. Brooker, after being duly sworn, on his oath states that the within information against H. R. Winchester is true.

L. P. Brooker.

Subscribed and sworn to before me this 4th day of September, A.D. 1928.

Pauline B. Harding,
Deputy Clerk of the County
Court".

Plaintiff in error made a motion to quash the information for the reason that the same was not verified as required by law,

State of Illinois
County of Cook

THE PEOPLE OF THE STATE OF
ILLINOIS
Be it remembered, that on this day
of the month of
A.D. 1900,
I, the Clerk of the County of Cook,
have filed for record and return
the following instrument, to-wit:

Testimony of J. W. Barker

Page 1

The State's Attorney of Cook County filed an information in
the county court against J. W. Barker, charging him with
constituting of two counts. The first count charged the defendant
in error with the unlawful possession, for the purpose of sale,
of intoxicating liquor without having a permit from the Attorney
General of the State of Illinois to possess such liquor.

In the second count it is charged that the defendant in
error unlawfully and knowingly, sold intoxicating liquor for
beverage purposes, which said intoxicating liquor then and there
contained more than one half of one per cent of alcohol by volume,
and was then and there fit for use for beverage purposes, without
having a permit from the Attorney General of the State of Illinois
to sell such liquor.

The information was signed and filed by J. W. Barker,
State's Attorney, but was not verified by him. Attached to the
information was the affidavit of one J. W. Barker, which reads as
follows: "I, J. W. Barker, of Cook County, Illinois, do hereby
state, after being duly sworn, on his oath
that the within information against J. W.
Barker is true."
J. W. Barker.

Subscribed and sworn to before me this 1st day of
September, A.D. 1900.
Notary Public for Cook County,
Illinois.

Plaintiff in error was a minor at the time of the information
and the return filed for the same was not verified as required by law.

which motion was overruled. A jury trial was had resulting in a verdict of guilty, under both counts of the information. Motion for new trial was made, and overruled, and thereupon plaintiff in error moved in arrest of judgment, basing his motion upon the ground that the information was not properly verified. The motion in arrest of judgment was denied and judgment rendered on the verdict of the jury.

On the first count of the information plaintiff in error was sentenced to the county jail of Lee County for a period of sixty days, and under the second count he was fined \$250.00 and adjudged to pay the fine and costs of suit. It was further ordered that he stand committed until the fine and costs were fully paid. The plaintiff in error sued out this writ of error for a review of the record by this court.

Owing to the conclusion we have reached it will be necessary to consider but one question raised and urged by the plaintiff in error for reversal of the judgment. As above shown the jurat was signed by Pauline B. Harding, Deputy Clerk of the County Court.

It is urged by plaintiff in error that his conviction was had under an information insufficiently verified, and that the court erred in denying the motion to quash, and in overruling the motion in arrest of judgment.

In the People vs. Peter San Fillipo, 255 Ill. App. 554, the defendant was tried and convicted on an information charging the unlawful sale of intoxicating liquor. He was sentenced to pay a fine of one thousand dollars, and to be imprisoned in the county jail of Winnebago County for a period of six months.

The only ground urged for a reversal of the judgment by San Fillipo was that the information was insufficiently verified. The record disclosed that the oath was administered by Martha E. Freeland, deputy clerk of the County Court.

In our opinion in that case we said, "The weight of authority is that while a deputy may generally perform all of the official acts which the principal can perform, every such act must be done in the name of the principal, and not in the name of the deputy.

(48 U. S. Officers, sec. 341.) In Village of Auburn vs. Goodwin

which would be verified. A jury trial was had resulting in a
verdict of guilty, under both counts of the indictment. After
the jury trial was held, and overruled, and subsequent finding in
error moved in arrest of judgment, because the action upon the
ground that the information was not properly verified. The motion
in arrest of judgment was denied and judgment rendered in the
case at the law.

On the first count of the information finding in error was
sentenced to the county jail of Lee County for a period of sixty
days, and under the second count he was fined \$25.00 and sentenced
to pay the fine and costs of suit. It was further ordered that
he stand committed until the fine and costs were fully paid. The
finding in error and out this writ of error for a review of
the record of this court.

Coming to the conclusion we have reached it will be necessary
to consider but one question raised and tried by the defendant.
Is error for reversal of the judgment. As above shown the facts
are stated by Justice E. Tamm, Deputy Clerk of the County Court.
It is urged by the defendant in error that the conviction was not
based on information lawfully verified, and that the court
erred in denying the motion to quash, and in overruling the motion
in arrest of judgment.

In the People vs. Peter Van Tilpoo, 228 Ill. App. 2d, the
defendant was tried and convicted on an information charging the
unlawful sale of intoxicating liquor. He was sentenced to pay
a fine of one thousand dollars, and to be imprisoned in the county
jail of Winnebago County for a period of six months.

The only ground urged for a reversal of the judgment in
Van Tilpoo was that the information was unlawfully verified.
The record reflects that the only law administered by Justice
E. Tamm, Deputy Clerk of the County Court.

In our opinion in this case we hold, "the right of a citizen
is that while a citizen may generally verify all of the official
acts which the official can perform, every such act must be done
in the name of the principal, and not in the name of the deputy.
(See C. J. ELLIOTT, 2d Ed. 101.) In Village of Aurora vs. Board of

128 Ill. 57, a surveyor's certificate signed "Cortes Fessender, Dep't Surveyor E. Co." was held invalid, because it was not in the name of the principal. In *Village of Augusta v. Tyner*, 197 Ill. 242, it was held that a survey and certificate made by a deputy county surveyor in his own name as deputy, and not in the name of the county surveyor, was invalid and did not have the effect to convey the fee of the street. ("See *Wilder v. Aurora, McComb & Rockford Electric Traction Co.*, 216 Ill. 493.) The text in 22 R.C.L. pp 583-584 lays down the rule that the authority of a deputy must be exercised in the name of him in whom it exists and not in the name of him who has no recognized authority.

Where this doctrine prevails, whatever official act is done by a deputy must be done in the name of his principal and not in the name of the deputy. If he undertakes to act in his own name in his own authority, he no longer acts as deputy, but in an independent capacity, and his acts can no longer be recognized as official. A distinction is sometimes made between deputies who are recognized by law as independent public officers, and those who are mere agents of the principal. In Illinois the courts have held that deputy clerks of county courts belong to the latter class, and that their powers are derivative, the actual authority being given to the principal. (*Village of Auburn v. Goodwin*, *supra*; *Hoppe v. Sawyer*, 14 Ill. 254; *Woodward v. Donovan*, 137 Ill. App. 503.) Under the authorities the jurat in the instant case should have been executed in the name of the clerk and not in the name of the deputy.

A prosecution upon an information which contains no sufficient verification is an invasion of a constitutional right and a denial of that right is an error for which the judgment must be reversed on a writ of error, unless the right is waived by a failure to insist upon it in the trial court. (*People v. Leinecke*, 290 Ill. 530.) Plaintiff in error made a proper objection to the defective jurat by a motion in arrest of judgment. The objection is properly preserved when raised either by a motion to quash or by a motion in arrest of judgment."

In view of our holding in the *San Filippo* case, we are of

Case No. 100, was held invalid, because it was not in

the name of the principal. In Village of Astoria v. Town of Astoria, 127

N.Y. 217, it was held that a conveyance and certificate made by a

county surveyor in his own name as surveyor, and not in the

name of the county surveyor, was invalid, and did not have the effect

to convey the fee of the estate. See Wilson v. Town of Astoria, 127

N.Y. 217. The case in 127

N.Y. 217, was held down the rule that the authority of a surveyor

must be exercised in the name of his principal, and not

in the name of his own, and no recognized authority.

Where this doctrine prevails, whenever official act is done

by a surveyor must be done in the name of his principal and not in

the name of the surveyor. If he undertakes to act in his own name

in the act, he is not acting as a surveyor, but in an

unauthorized capacity, and his acts can no longer be recognized as

official. A distinction is made between acts done in the name of the

principal and acts done in the name of the surveyor, and acts

done in the name of the principal. In Village of Astoria v. Town of Astoria, 127

N.Y. 217, it was held that the authority of a surveyor

must be exercised in the name of his principal, and not in the name of the

surveyor. If he undertakes to act in his own name

in the act, he is not acting as a surveyor, but in an

unauthorized capacity, and his acts can no longer be recognized as

official. A distinction is made between acts done in the name of the

principal and acts done in the name of the surveyor, and acts

done in the name of the principal. In Village of Astoria v. Town of Astoria, 127

N.Y. 217, it was held that the authority of a surveyor

must be exercised in the name of his principal, and not in the name of the

surveyor. If he undertakes to act in his own name

in the act, he is not acting as a surveyor, but in an

unauthorized capacity, and his acts can no longer be recognized as

official. A distinction is made between acts done in the name of the

the opinion that the conviction of Winchester, plaintiff in error, was had under an information with a fatally defective and insufficient verification, and the objection was properly made by a motion to quash, as well as in arrest of judgment.

The trial court therefore erred in overruling the motion to quash, also in denying the motion in arrest of judgment, and for these reasons the judgment of conviction must be reversed.

Judgment reversed.

the matter that the University of Wisconsin, Madison, has
-1- the right to determine the policy of the University and the
policy of the Board of Regents, and the objection was made as a matter
of course, it will be in order to be heard.

The Board of Regents of the University of Wisconsin, Madison, has
the right to determine the policy of the University and the
policy of the Board of Regents, and the objection was made as a matter
of course, it will be in order to be heard.

The Board of Regents of the University of Wisconsin, Madison, has
the right to determine the policy of the University and the
policy of the Board of Regents, and the objection was made as a matter
of course, it will be in order to be heard.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: On

APR 11 1930 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

| | | |
|--------------------|----|---------------------------|
| The People of the | :: | |
| State of Illinois, | :: | |
| Deft. in Error | :: | |
| vs. | :: | Error to the County Court |
| | :: | |
| Nemoram Pierre, | :: | of Lee County. |
| Pltf. in Error | :: | |

February Term, 1930

Jett: J.

The questions involved in this case are the same as those in *People v. M. R. Winchester*, plaintiff in error, in No. 8166, in which an opinion has been filed.

For the reasons given in No. 8166, the judgment in this cause is reversed.

Judgment reversed.

It is the duty of the court to see that the law is properly administered.

The people of the State of Illinois, County of Cook, ss. I, the Clerk of said County, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of said County.

Witness my hand and seal of office at Chicago, Illinois, this 10th day of June, 1900.

Test: J. J.

The questions involved in this case are the same as those in People v. W. H. Winchester, Plaintiff in error, in No. 2186, in which an opinion has been filed.

For the reasons given in No. 2186, the judgment in this cause is reversed.

Reversed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

7

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in the year of our Lord one thousand nine hundred and thirty, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 656'

BE IT REMEMBERED, that afterwards, to-wit: On

APR 11 1930 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

| | | |
|--------------------|---|---------------------------|
| The People of the | : | |
| State of Illinois, | : | |
| Deft. in Error. | : | |
| vs. | : | Error to the County Court |
| | : | of Lee County. |
| Leroy McDermott, | : | |
| Pltf. in Error | : | |

February Term, 1950.

Jett:J.

The questions here raised were decided in People vs. Winchester No. 8166, in which an opinion has been filed. For the reasons assigned in No. 8166, the judgment in this cause is reversed.

Judgment reversed.

of the County Court
of the County.

The people of the
County of Illinois
do hereby certify
that the within
copy is a true
and correct copy
of the original
filed in the
County Clerk's
office.

Notary Public, 1930.

Test.

The questions here raised were decided in the case
of the County Court, in which an opinion was given. The
persons assigned in the case, the judgment in this case
is reversed.

Witness my hand and seal.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

72a AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 656

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 2 1930 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

| | | |
|----------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF | : | |
| ILLINOIS, | : | |
| Defendants in error, | : | |
| vs. | : | Writ of error, |
| | : | to Circuit Court, |
| | : | La Salle County. |
| FRANK LEROY LAWSON, JACOB | : | |
| KOREN, MARGARET LAWSON and | : | |
| HENRY FRITZINGER, | : | |
| Plaintiffs in error. | : | |

Boggs, P. J.

Substantially the same facts are involved and the same questions of law are raised on the assignment of errors and in the briefs and arguments of counsel in this case as in *People v. Fritzinger*, gen. no. 8060, in which an opinion has been filed at this term. For the reasons therein set forth, the judgment of the trial court in this case will be affirmed.

Judgment affirmed.

State of Illinois,
County of Cook,
ss. I, the Clerk of said Court,
do hereby certify that the within
is a true and correct copy of the
original filed in my office.

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendants in error,
vs.
JAMES EARL RAY,
KOREN, MARGARET LAWSON and
JAMES EARL RAY,
Plaintiffs in error.

Substantially the same facts are involved and the same
questions of law are raised on the assignment of errors and in
the briefs and arguments of counsel in this case as in People v.
Brittenger, Gen. No. 8000, in which an opinion has been filed
at this time. For the reasons therein set forth, the judgment
of the trial court in this case will be affirmed.

Witness my hand and seal of office this 10th day of June, 1968.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 656³

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 9 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

William Straus, (identical with
William Strauss),

Appellee,

vs.

Appeal from Circuit Court

of Livingston County.

J. R. Scarratt, as Sheriff of
Livingston County, Illinois,

Appellant,

OPINION by BOGGS, P. J.

An action in replevin was instituted by appellee in the circuit court of Livingston county against appellant sheriff, to recover 1367 bushels of oats.

The record discloses that on September 1st, 1919, one Alice J. Houston, being the owner of a certain 160 acre farm in said county, executed a trust deed to secure an indebtedness of \$26,000 due September 1, 1929. On October 27, 1927, said premises were conveyed to Carl F. Erikson, who on the same day conveyed the same subject to said trust deed to one Guyneth D. King.

On May 1, 1928, a judgment for \$2,589.02 in favor of one R. Rodeck was rendered against Guyneth D. King and O. F. King, her husband, in the Municipal court of Chicago. On May 21, a transcript thereof was filed in Livingston county. Guyneth D. King leased said premises to one Burley Brown, for a term of one year beginning March 1, 1928. On December 13, the interest on said mortgage indebtedness not having been paid, appellee elected to declare the whole of said indebtedness due and filed a bill praying strict foreclosure of said trust deed. Rodeck, who was made a party to said proceeding, entered his appearance and consented in writing that a decree of strict foreclosure might be entered.

On April 8th, 1929, an execution was issued on said judgment and placed in the hands of appellant. On May 7th, a decree of strict foreclosure was entered. On May 11th, Guyneth D. King and husband, executed a quit claim deed conveying said premises to appellee. Said deed was acknowledged on May 29th, and was filed for record on June 15.

(identical with
William Strass,
William Strass)

Appellee,

Appeal from Circuit Court

vs.

of Livingston County.

R. Beckwith, as Sheriff of
Livingston County, Illinois,

Appellant.

OPINION BY BOGGS, P. J.

An action in replevin was instituted by appellee in the circuit
court of Livingston county against appellant sheriff, to recover 1887

value of oats.

The record discloses that on September 1st, 1919, one John J.

Watson, being the owner of a certain 160 acre farm in said county,

caused a trust deed to secure an indebtedness of \$25,000 due Septem-

ber 1, 1929. On October 27, 1927, said premises were conveyed to Carl

Watson, who on the same day conveyed the same subject to said trust

deed to one Guyne D. King.

On May 1, 1928, a judgment for \$2,280.00 in favor of one H. Boggs

was rendered against Guyne D. King and O. B. King, her husband, in

the Circuit Court of Livingston County. On May 21, a writ of fieri facias was

issued in Livingston county. Guyne D. King leased said premises to

Barley Brown, for a term of one year beginning March 1, 1929.

On September 16, the interest on said mortgage indebtedness not being

paid, appellee elected to declare the whole of said indebtedness

due and filed a bill praying strict foreclosure of said trust deed.

Week, who was made a party to said proceeding, entered his appear-

ance and consented in writing that a decree of strict foreclosure might

be entered.

On April 25th, 1929, an execution was issued on said judgment and

issued in the hands of appellant. On May 7th, a decree of strict

foreclosure was entered. On May 11th, Guyne D. King and husband,

caused a quit claim deed conveying said premises to appellee. Said

deed was acknowledged on May 21st, and was filed for record on June 11.

On July 6th, appellant levied on the growing crops on said premises. On July 20th, the oats were harvested, and on August 14th were threshed, one-half thereof being placed in a bin on said premises. The other half was retained by said tenant. On August 16th, a demand was made by appellee on appellant for said oats; delivery being refused, this replevin suit followed. To the declaration, which was in the usual form, appellant filed a plea that he did not take and detain the property, etc., a plea that the goods were not the property of appellee, and a plea setting forth that the goods in question were taken and detained by appellant by virtue of the execution and levy in question, etc. Replications, traversing said pleas, were filed. A trial was had and at the close of all of the evidence a motion by appellant to exclude the evidence and a verdict in his favor was denied. Thereupon, on the motion of appellee, a verdict was directed in his favor. Judgment was rendered thereon awarding said property to appellee, etc. To reverse said judgment this appeal is prosecuted.

It is contended on the part of counsel for appellant that when said execution came to his hands as sheriff it at once became a lien on the growing crops on said premises; that said lien continued in effect until July 6th, when said levy was made, and that he of right took possession of said oats when threshed.

The lease in question provided that Brown, the lessee, was "to have and to hold" said premises from March 1, 1929, to March 1, 1930; that he was to pay, as rent therefor, " $\frac{1}{4}$ of all oats or wheat raised on the farm, threshed in bins on farm and delivered then, later, in elevator in Cornell at option of first party," etc.

Under the provisions of said lease, the title to the whole of said crop was in the lessee until the stipulated rent had been paid. Alwood v. Ruckman, 21 Ill. 200-201; Dixon v. Niccols, 39 Ill. 372-376; Sargent v. Courrier, 66 Ill. 245-246; Mulheisen v. Lane, 82 Ill. 117-119; Frink v. Pratt, 130 Ill. 327-331; Finney v. Harding, 136 Ill. 573-580; Hansen v. Dennison, 7 App. 73-78; Travers v. Cook, 43 App. 580-582; John Hancock Mutual Life Ins. Co. v. Watson, 200 App. 315-318.

It therefore follows that the interest of said mortgagor in said crops was not liable to the lien of an execution.

Even though it be conceded that the interest of the mortgagor in said growing crops was subject to the lien of said execution, still, as against appellee as the purchaser of said premises, a levy on said crop must have been made prior to said conveyance.

While an execution is a lien on personal property from the time it comes to the hands of the officer for collection, yet if no levy be made, the purchaser for value of such property holds the same as against such execution, unless such purchase was made for the purpose of defeating said execution. *Powers v. Wheeler*, 53 Ill. 29-31; *Finney v. Harding*, supra, 579; *Kerr on Fraud and Mistake*, 201.

There is no charge in the pleadings that appellee, in taking said deed, did so for a fraudulent purpose, and there is no evidence in the record to sustain a charge of that kind if it had been made. Said deed recites a consideration of \$200, and, in the absence of proof to the contrary, it will be presumed that such was the consideration.

Under the above authorities, said conveyance passed the growing crops to appellee, and he can hold the same against said execution. See also *Firebaugh v. Divan*, 207 Ill. 267-289; 4 Kent's Com., 468.

It was also insisted by counsel for appellant that the conveyance to appellee was in fraud of his rights as the holder of said execution. In this connection it is insisted that all crops harvested and delivered prior to September 4, 1929, the expiration of the time given by said decree within which to pay said mortgage indebtedness, would be subject to the lien of said execution, and could be levied upon and sold in satisfaction thereof; that to hold said deed out off said right, would be, as against him a fraud. In the absence of any charge of fraud in the pleadings or proof, what we have already said sufficiently disposes of this contention.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

It therefore follows that the interest of said mortgagee in

a crop was not liable to the lien of an execution.

Even though it be conceded that the interest of the mortgagee
said growing crops was subject to the lien of said execution, still,
against appellee as the purchaser of said premises, a levy on said
crops must have been made prior to said conveyance.

While an execution is a lien on personal property from the time
it comes to the hands of the officer for collection, yet it is no levy
made, the purchaser for value of such property holds the same as
against such execution, unless such purchase was made for the purpose
of defrauding said execution. *Howers v. Wheeler*, 55 Ill. 22-23; *Klaney*
standing, supra, 279; *Kerr on Fraud and Mistake*, 301.

There is no change in the pleadings that appellee, in taking said
crops, did so for a fraudulent purpose, and there is no evidence in the
record to sustain a charge of that kind if it had been made. But said
charge is a consideration of \$200, and, in the absence of proof to the
contrary, it will be presumed that such was the consideration.

Under the above authorities, said conveyance passed the growing
crops to appellee, and he can hold the same against said execution.
See also *Birdshead v. Dixon*, 207 Ill. 224-225; 4 Kent's Com., 488.

It was also insisted by counsel for appellant that the conveyance
of appellee was in fraud of his rights as the holder of said execution.
This contention it is insisted that all crops harvested and delivered
prior to September 4, 1889, the expiration of the time given by said
execution to pay said mortgage indebtedness, would be subject

to the lien of said execution, and could be levied upon and sold in
satisfaction thereof; that to hold said seed out of said rights, would
be against him a fraud. In the absence of any change of fraud in the
pleading or proof, what we have already said sufficiently disposes of
this contention.

For the reasons above set forth, the judgment of the trial court

is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:
Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 LA. 656

BE IT REMEMBERED, that afterwards, to-wit: On

1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|----------------------|---|------------------|
| THE JOLIET NATIONAL | : | |
| BANK, A Corporation, | : | |
| Appellant, | : | |
| | : | |
| vs. | : | Appeal from the |
| | : | |
| THOMAS McEVILLY, | : | Circuit Court of |
| Appellee | : | Will County. |

Opinion, Boggs, P.J.

On June 17, 1924, judgment by confession for \$1604.62 was entered against appellee and one William McEvilly in the circuit court of Will county in favor of appellant on a note for ~~the~~ \$1,400, dated November 18, 1922. On November 26, 1927, a motion, supported by affidavit, was made by appellee to open said judgment, for leave to plead, etc., which was allowed. Thereafter on May 1, 1929, said judgment was vacated, and the suit was dismissed as to William McEvilly, who had died prior to this time. By agreement appellant was given leave to file an amended declaration, consisting of the common counts and a special count based on a note signed by William McEvilly and appellee, dated January 12, 1921, for \$900.

To said declaration appellee filed five pleas, consisting of the general issue, a plea of the five-year statute of limitations, a plea of payment by William McEvilly, a plea of payment by acceptance of certain new notes with the name of appellee forged as a maker thereon, and a plea that appellee was a surety on said note and that the time of payment had been extended without his knowledge and consent. It was stipulated by said parties that said cause be tried as if proper replications were on file, traversing said pleas, etc. A trial was had, resulting in a verdict and judgment in favor of appellee. To reverse said judgment this appeal is prosecuted.

At the conclusion of the evidence, and before the arguments, it was announced by the court: "It is stipulated and agreed between counsel that written instructions shall be waived; that

THE JUDGE, NATIONAL
DEPT. & CONFIDENTIAL
AGENCY

RE.

THE JUDGE, NATIONAL
DEPT. & CONFIDENTIAL
AGENCY

Appeal from the
Circuit Court of
the State of Florida

Opinion, Rogers, P. J.

On June 14, 1924, judgment by confession for \$1604.82

was entered against appellee and one William McVilly in the
circuit court of Will county in favor of appellant on a note for
\$1,604.82, dated November 15, 1921. On November 22, 1921, a
motion, supported by affidavit, was made by appellee to open said
judgment, for leave to plead, etc., which was allowed. Thereafter
on May 1, 1922, said judgment was vacated, and the suit was dis-
missed as to William McVilly, who had died prior to this time.
By agreement appellant was given leave to file an amended decla-
tion, consisting of the common counts and a special count based
on a note signed by William McVilly and appellee, dated January
12, 1921, for \$200.

To said declaration appellee filed five pleas, consisting
of the general issue, a plea of the five-year statute of limitations,
a plea of payment by William McVilly, a plea of payment by ac-
ceptance of certain new notes with the name of appellee forged
as a maker thereon, and a plea that appellee was a surety on said
note and that the time of payment had been extended without his
knowledge and consent. It was stipulated by said parties that
said cause be tried as if proper replications were on file, trans-
ferring said pleas, etc. A trial was had, resulting in a verdict and
judgment in favor of appellee. To reverse said judgment this

appeal is presented.

At the conclusion of the evidence, and before the argu-
ment, it was announced by the court: "It is stipulated and agreed
that the cause be tried as if proper replications were on file, trans-
ferring said pleas, etc."

they may be permitted to state their views as to the law to the jury, and if there is any dispute between them, the court may orally instruct the jury as to his view with reference thereto." Thereafter counsel for appellant and appellee stated to the jury their views as to the law applicable to the case and, there being no dispute between them, the court gave no instructions to the jury, except as to the form of the verdict.

The sole question for our determination is as to whether the evidence is sufficient to support the verdict.

The note in question was executed by William McEvilly and appellee on January 12th, 1921. Thereafter on February 16 of that year William McEvilly applied to appellant for an additional loan of \$500. A note for \$1,400 of that date due in ninety days was delivered to William McEvilly, to procure the signature of appellee. Thereafter, on May 17 and August 18, 1921, February 16, September 16 and November 16, 1922, notes for a like amount were delivered to William McEvilly to procure appellee's signature.

On the trial of said cause, one William Redmon, president of appellant bank, testified that at the time of the execution of the note for \$900.00 both of said parties were in the bank; that appellee did most of the talking, and said that they wanted to borrow \$900.

William Murphy, an employee of appellant bank, testified among other things that: "Before this suit was started * * * Thomas and Charles had both come into the bank in reply to a letter I had written them in regard to this note (the \$1,400.00 note on which judgment was taken), and I took them down into the directors' room and talked with them about it. Thomas claimed it was a forgery and that he had never signed it."

Both Redmon and Murphy testified that when said \$1,400 notes were taken, they believed the signatures thereon were genuine. Redmon further testified that thereafter on expert advice, he had come to the conclusion the same were forgeries. Appellee and Charles McEvilly were called as witnesses for appellant. Appellee testified that he had signed the \$900 note, but that the name of Thomas McEvilly on the \$1,400 notes was not his signature, but had

they may be permitted to state their views as to the law to the jury, and if there is any dispute between them, the court may still instruct the jury as to the law with reference to the law. The court is not bound to follow the views of the jury, but its views as to the law applicable to the case and, there being no dispute between them, the court gave no instructions to the jury, except as to the form of the verdict.

The sole question for our determination is as to whether the evidence is sufficient to support the verdict.

The note in question was executed by William McEvilly and appellee on January 12th, 1921. Thereafter on February 12 of that year William McEvilly applied to appellant for an additional loan of \$500. A note for \$1,400 of that date due in ninety days was delivered to William McEvilly, to procure the signature of appellee. Thereafter, on May 14 and August 18, 1921, February 16, September 16 and November 16, 1922, notes for a like amount were delivered to William McEvilly to procure appellee's signature.

On the trial of said cause, one William Redmon, president of appellant bank, testified that at the time of the execution of the note for \$900.00 both of said parties were in the bank; that appellee did most of the talking, and said that they wanted a note for \$900.

William Murphy, an employee of appellant bank, testified among other things that: "Before this suit was started * * * Thomas and Charles had both come into the bank in reply to a letter I had written them in regard to this note (the \$1,400.00 note on which judgment was taken), and I took them down into the directors' room and talked with them about it. Thomas claimed it was a forgery and that he had never signed it."

Both Redmon and Murphy testified that when said \$1,400 notes were taken, they believed the signatures thereon were genuine. Redmon further testified that thereafter on expert advice, he had come to the conclusion the same were forgeries. Appellee and Charles McEvilly were called as witnesses for appellant. Appellee testified that he had signed the \$900 note, but that the name of Thomas McEvilly on the \$1,400 notes was not his signature, but had

been forged. Charles McEvilly testified that his name had also been forged.

Appellee testified in his own behalf that in June, 1921, he went with his brother William to appellant's bank; that "he (William) wanted some money and he went up and asked Mr. Redmon if he could have some money, and that I would sign for him. Mr. Redmon asked him how much he wanted and he said \$900. He let him have the money and I signed the note for him * * *. No one in the conversation other than my brother said anything about borrowing money." He further testified: "After the execution of that note I never at any time received any notice of any kind relative to the indebtedness due the bank on that note or any other note signed by my brother William. * * * I received notices from the bank on the note that I had personally there, every ninety days. After the signing of the note for \$900 I first learned that the bank claimed that I owed them something on account of my brother William was in 1923, August or September, I think it was. Mr. Redmon was in there or Mr. Murphy, and he showed me this note and told me to see William about it and have it renewed. I told him I would see William about it, which I did. Nothing else was said at that time about the note. Afterwards I told William about it and he told me not to worry, that he knew that I did not sign it, that he would take care of it. * * * The next I heard from the bank was I think in January, 1924, I went in to do some business and I told Mr. Murphy about it. He put a note in front of me and said, 'Here is this note of Williams' I says, 'It don't make no difference to me, I never signed it. I told William about it and he says he would take care of it.' Mr. Murphy says he suspected something like that, * * * My brother (William McEvilly) died in July, 1925. That was all I heard about these notes until I got my notice two years ago about this time, that there was a judgment and a summons served on me. The sheriff served an execution on me. That is the judgment I was talking about when I was on the witness stand a little while ago. That was afterwards vacated."

Appellee further testified that he had been a borrower at appellant's bank since in 1921, and had carried a checking account

[illegible]

in said bank. The records of appellant bank disclose that the interest on said notes was in each instance paid in advance.

It is contended on the part of appellant that, inasmuch as appellee's name had been forged on the several \$1,400 notes, appellant would have the right to recover on the note of \$900. On the other hand, appellee insists that the jury were fully warranted in finding that he, appellee, had signed said note of \$900 as a surety, and that it was the intention of William McEvilly and of appellant bank that the taking of the first note for \$1,400 was in payment of said note of \$900; that appellant bank, through its officers, was negligent in accepting the several \$1,400 notes without ascertaining from appellee whether he had in fact signed the same; that appellant bank ~~was paid the interest~~ through its officers was negligent in accepting the several \$1,400 notes without ascertaining from appellee whether he had in fact signed the same; that appellant bank was paid the interest in advance on each of said renewal notes, and that this amounted to an extension of time of payment of the indebtedness in question, without the knowledge or consent of appellee.

The giving of a promissory note in renewal of another does not, of itself, operate as a satisfaction of the original note. Whether it does so or not is a question of fact, for the determination of the jury, and depends upon the intention of the parties. If it is made and accepted for such purpose, the former note is satisfied. *Bellevue Savings Bank v. Bornman*, 134 Ill. 200; *Jansen v. Grimshaw*, 125 Ill. 408; *Bolter v. Joliet Natl. Bank*, 295 Ill. 594-596.

The giving of a new note is prima facie payment of the original debt. *Smalley v. Edey*, 19 Ill. 207; *Leake v. Brown*, 43 Ill. 372; *Trego v. Estate of Cunningham*, 267 Ill. 367-375.

The pleadings presented the issue as to whether the first renewal note was taken in payment of said note here sued on, and as to whether appellant bank was negligent in accepting said \$1,400 notes without ascertaining from appellee whether he had in fact signed or authorized the signing of his name as a maker thereon. We are not prepared to say that the verdict of the jury is against

The giving of a promissory note in payment of another does not, of itself, operate as a satisfaction of the original debt. Whether it does so or not is a question of fact, for the determination of which the jury, not depends upon the intention of the parties. If it is made and accepted for such purpose, the former debt is satisfied. *Bellows Savings Bank v. Barnum*, 184 Ill. 600; *Jensen v. Crimshaw*, 185 Ill. 488; *Potter v. Potter Natl. Bank*, 187 Ill. 524.

The giving of a new note in place of the old one, without any agreement to discharge the old one, does not constitute a satisfaction of the old debt. *Trego v. Estate of Cunningham*, 207 Ill. 529-532.

The plaintiff presented the same as to whether the first renewal note was taken in payment of said note and as to whether appellant bank was negligent in accepting said \$1,400 note without ascertaining from appellee whether he had in fact signed the same.

The giving of a promissory note in payment of another does not, of itself, operate as a satisfaction of the original debt. Whether it does so or not is a question of fact, for the determination of which the jury, not depends upon the intention of the parties. If it is made and accepted for such purpose, the former debt is satisfied. *Bellows Savings Bank v. Barnum*, 184 Ill. 600; *Jensen v. Crimshaw*, 185 Ill. 488; *Potter v. Potter Natl. Bank*, 187 Ill. 524.

The giving of a new note in place of the old one, without any agreement to discharge the old one, does not constitute a satisfaction of the old debt. *Trego v. Estate of Cunningham*, 207 Ill. 529-532.

The plaintiff presented the same as to whether the first renewal note was taken in payment of said note and as to whether appellant bank was negligent in accepting said \$1,400 note without ascertaining from appellee whether he had in fact signed the same.

the manifest weight of the evidence on said issues. As these were the vital issues in the case, it is not necessary for us to discuss any of the other questions sought to be raised.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof.
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 656⁵

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 8 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|-----------------------------|---|-----------------|
| SALVATOR CARUSO, | : | |
| Appellee | : | |
| | : | |
| -vs- | : | |
| | : | |
| GLOBE MUTUAL LIFE INSURANCE | : | Appeal from |
| COMPANY, | : | Circuit Court |
| Appellant. | : | of Will County. |

Opinion, Boggs, P. J.

An action in assumpsit was instituted by appellee against appellant in the circuit court of Will county to recover on insurance policy, issued on the life of appellee's wife.

The declaration sets forth the policy, avers its delivery on October 31, 1928, notice and proof of death, demand for payment and its refusal by appellant, and contains the general averment of full performance on the part of the assured and of appellee as beneficiary under said policy.

To said declaration appellant filed a plea of the general issue and four special pleas. The first special plea avers that the policy in question provides that it shall not take effect if the insured on the date thereof is not in sound health; that on October 29, the date of said policy, the assured was not in sound health, but was suffering from erysipelas and other ailments which resulted in her death. The second special plea sets forth that the application signed by the assured provided that any contract of insurance issued thereon should not be binding on the company unless, on the date and delivery, the insured should be alive and in sound health; that on October 31, 1928, the date of delivery, the insured was not in sound health, but was afflicted with erysipelas, etc. Each of said pleas conclude with a verification. The third and fourth special pleas were withdrawn by appellant.

Replications were filed to said pleas, traversing the averments with reference to the health of the insured. A trial was had, resulting in a verdict and judgment in favor of appellee for \$524.08. To reverse said judgment, this appeal is prosecuted.

SALVATOR CARUSO
Appelée
- -
ALORS METTIL L'ESPEANCE
CANTAT
Appellant.

Appeal from
District Court
at St. Louis

Opinion, Rogers, P. 7.

will performance on the part of the assured and of appellee as bona-fide performance by appellee, and contains the general agreement of and its refusal by appellee, and notice and proof of death, demand for payment on October 31, 1928, and the declaration sets forth the policy, even its delivery once policy, issued on the life of appellee's wife.

Appellant in the circuit court of Will county to recover on insurance action in assumpsit was instituted by appellee against

To said declaration appellant filed a plea of the non-
trial issue and four special pleas. The first special plea avers
that the policy in question provides that it shall not take effect
if the insured on the date thereof is not in sound health; that on
October 22, the date of said policy, the insured was not in sound
health, but was suffering from erysipelas and other ailments which
resulted in her death. The second special plea sets forth that the
application signed by the insured provided that any contract of
insurance issued thereon should not be binding on the company un-
less, on the date and delivery, the insured should be alive and in
sound health; that on October 21, 1928, the date of delivery,
the insured was not in sound health, but was afflicted with ery-
sipelas, etc. Each of said pleas concludes with a verification.
The third and fourth special pleas were withdrawn by appellant.
Repetitions were filed to said pleas, traversing the
averments with reference to the health of the insured. A trial
was had, resulting in a verdict and judgment in favor of appellee.
To reverse said judgment, this appeal is presented.

It is first contended that the declaration does not state a cause of action. It is urged that, under the terms of said policy it was necessary to aver and prove, as a condition precedent, that at the date and delivery of said policy, the insured was in sound health, and that no such averment was made.

The declaration, among other things, avers "that the said Anna Caruso did, during her lifetime, keep, perform and comply with the terms, provisions and conditions of the policy of insurance upon her part to be kept and performed by the terms thereof, etc., and that the plaintiff has at all times kept, performed, observed and complied with all the terms, provisions and conditions of the said policy upon his part, by the terms thereof, to be kept and performed."

After judgment, the pleading upon which such judgment is based is liberally construed, for the purpose of sustaining the judgment. *Chicago & A. R. Co. v. Clausen*, 175, Ill. 100-103; *Clawiter v. Jones*, 219 Ill. 626-629; *Sargent Co. v. Baublis*, 215 Ill. 428-430; *Diamond Glue Co. v. Wietzyehowski*, 227 Ill. 350-348; *Plew v. Board*, 294 Ill. 232-234; *Wagner v. Chicago, R. I & P. R. Co.*, 227 Ill. 114-119.

After verdict and judgment, every reasonable inference and intendment goes in support of the declaration. *Cerke v. Jancher* 158 Ill. 375-379; *Willis Coal & Mining Co. v. Grizzel*, 100 App. 480-485.

We hold that, after verdict, the allegations of the declaration are sufficient to support the judgment.

If it be conceded that the averments of the declaration are not sufficient after verdict, appellant is not in a position to complain, for the reason that, by its affirmative pleas, it tendered an issue as to the health of the insured at the time in question. Appellee having accepted the tender and joined issue thereon, the omission was cured. *Weber & Holmes v. Curtis*, 36 Ill. 156-158, citing 1 Chitty's Pleading (10th Am. Ed.) 573; *Reubens v. Hill*, 315 Ill. 522-537.

It is next insisted that appellee should have proved as a part of his case that the insured "was in sound health on the date

It is first contended that the Declaration does not state a way of action. It is urged that, under the terms of said policy it was necessary to aver and prove, as a condition precedent, that the date of delivery of said policy, the insured was in sound health, and that no such averment was made.

The declaration, among other things, avers "that the said Mrs. Garuso did, during her lifetime, keep, perform and comply with the terms, provisions and conditions of the policy of insurance upon her part to be kept and performed by the terms thereof, etc., and that the plaintiff has at all times kept, performed, observed and complied with all the terms, provisions and conditions of the said policy upon his part, by the terms thereof, to be kept and performed."

passed as liberally construed, for the purpose of sustaining the
After judgment, the pleading upon which such judgment is

III. 114-116.
v. Jones, 219 III. 686-689; Sergeant Co. v. Baublis, 219 Ill. 480-
481; Diamond Mine Co. v. Wisniewski, 227 Ill. 323-345; Elw v.

After verdict and judgment, every reasonable inference and argument goes in support of the declaration. *Garbo v. Garbo*, 100 Ill. 2d 100, 101-102, 103-104, 105-106, 107-108, 109-110, 111-112, 113-114, 115-116, 117-118, 119-120, 121-122, 123-124, 125-126, 127-128, 129-130, 131-132, 133-134, 135-136, 137-138, 139-140, 141-142, 143-144, 145-146, 147-148, 149-150, 151-152, 153-154, 155-156, 157-158, 159-160, 161-162, 163-164, 165-166, 167-168, 169-170, 171-172, 173-174, 175-176, 177-178, 179-180, 181-182, 183-184, 185-186, 187-188, 189-190, 191-192, 193-194, 195-196, 197-198, 199-200, 201-202, 203-204, 205-206, 207-208, 209-210, 211-212, 213-214, 215-216, 217-218, 219-220, 221-222, 223-224, 225-226, 227-228, 229-230, 231-232, 233-234, 235-236, 237-238, 239-240, 241-242, 243-244, 245-246, 247-248, 249-250, 251-252, 253-254, 255-256, 257-258, 259-260, 261-262, 263-264, 265-266, 267-268, 269-270, 271-272, 273-274, 275-276, 277-278, 279-280, 281-282, 283-284, 285-286, 287-288, 289-290, 291-292, 293-294, 295-296, 297-298, 299-300, 301-302, 303-304, 305-306, 307-308, 309-310, 311-312, 313-314, 315-316, 317-318, 319-320, 321-322, 323-324, 325-326, 327-328, 329-330, 331-332, 333-334, 335-336, 337-338, 339-340, 341-342, 343-344, 345-346, 347-348, 349-350, 351-352, 353-354, 355-356, 357-358, 359-360, 361-362, 363-364, 365-366, 367-368, 369-370, 371-372, 373-374, 375-376, 377-378, 379-380, 381-382, 383-384, 385-386, 387-388, 389-390, 391-392, 393-394, 395-396, 397-398, 399-400, 401-402, 403-404, 405-406, 407-408, 409-410, 411-412, 413-414, 415-416, 417-418, 419-420, 421-422, 423-424, 425-426, 427-428, 429-430, 431-432, 433-434, 435-436, 437-438, 439-440, 441-442, 443-444, 445-446, 447-448, 449-450, 451-452, 453-454, 455-456, 457-458, 459-460, 461-462, 463-464, 465-466, 467-468, 469-470, 471-472, 473-474, 475-476, 477-478, 479-480, 481-482, 483-484, 485-486, 487-488, 489-490, 491-492, 493-494, 495-496, 497-498, 499-500, 501-502, 503-504, 505-506, 507-508, 509-510, 511-512, 513-514, 515-516, 517-518, 519-520, 521-522, 523-524, 525-526, 527-528, 529-530, 531-532, 533-534, 535-536, 537-538, 539-540, 541-542, 543-544, 545-546, 547-548, 549-550, 551-552, 553-554, 555-556, 557-558, 559-560, 561-562, 563-564, 565-566, 567-568, 569-570, 571-572, 573-574, 575-576, 577-578, 579-580, 581-582, 583-584, 585-586, 587-588, 589-590, 591-592, 593-594, 595-596, 597-598, 599-600, 601-602, 603-604, 605-606, 607-608, 609-610, 611-612, 613-614, 615-616, 617-618, 619-620, 621-622, 623-624, 625-626, 627-628, 629-630, 631-632, 633-634, 635-636, 637-638, 639-640, 641-642, 643-644, 645-646, 647-648, 649-650, 651-652, 653-654, 655-656, 657-658, 659-660, 661-662, 663-664, 665-666, 667-668, 669-670, 671-672, 673-674, 675-676, 677-678, 679-680, 681-682, 683-684, 685-686, 687-688, 689-690, 691-692, 693-694, 695-696, 697-698, 699-700, 701-702, 703-704, 705-706, 707-708, 709-710, 711-712, 713-714, 715-716, 717-718, 719-720, 721-722, 723-724, 725-726, 727-728, 729-730, 731-732, 733-734, 735-736, 737-738, 739-740, 741-742, 743-744, 745-746, 747-748, 749-750, 751-752, 753-754, 755-756, 757-758, 759-760, 761-762, 763-764, 765-766, 767-768, 769-770, 771-772, 773-774, 775-776, 777-778, 779-780, 781-782, 783-784, 785-786, 787-788, 789-790, 791-792, 793-794, 795-796, 797-798, 799-800, 801-802, 803-804, 805-806, 807-808, 809-810, 811-812, 813-814, 815-816, 817-818, 819-820, 821-822, 823-824, 825-826, 827-828, 829-830, 831-832, 833-834, 835-836, 837-838, 839-840, 841-842, 843-844, 845-846, 847-848, 849-850, 851-852, 853-854, 855-856, 857-858, 859-860, 861-862, 863-864, 865-866, 867-868, 869-870, 871-872, 873-874, 875-876, 877-878, 879-880, 881-882, 883-884, 885-886, 887-888, 889-890, 891-892, 893-894, 895-896, 897-898, 899-900, 901-902, 903-904, 905-906, 907-908, 909-910, 911-912, 913-914, 915-916, 917-918, 919-920, 921-922, 923-924, 925-926, 927-928, 929-930, 931-932, 933-934, 935-936, 937-938, 939-940, 941-942, 943-944, 945-946, 947-948, 949-950, 951-952, 953-954, 955-956, 957-958, 959-960, 961-962, 963-964, 965-966, 967-968, 969-970, 971-972, 973-974, 975-976, 977-978, 979-980, 981-982, 983-984, 985-986, 987-988, 989-990, 991-992, 993-994, 995-996, 997-998, 999-1000,

It is next insisted that appellee should have moved on a

of the delivery of the policy." On direct examination appellee was asked: "What was the condition of her (the insured's) health the day the policy was delivered?" The question was objected to on the ground that it was a self-serving statement; a declaration in interest. Thereupon counsel for appellee withdrew the question. Appellant is not in a position to urge with effect this contention, especially in view of its affirmative pleas.

In *Hammer v. Globe Mutual Life Ins. Co.*, 246, App. 109, the court, in discussing a question of this character, at page 111 says:

"Although the plaintiff alleged in her declaration that her husband, during his lifetime, in all respects complied with the conditions of the policy of insurance, the defendant did not file a plea of the general issue, but, by a special plea, alleged that the policy provided that it would not take effect if the insured 'before or on the date of the policy was not in sound health,' and then averred that 'the insured was not in sound health on the date of the policy, but, on the contrary, was in unsound health, so that the policy never took effect.' This pleading would indicate that the defendant was treating this matter as an affirmative defense, on which it had the burden of proof."

Upon objection to the question propounded to appellee for the purpose of showing the condition of the insured's health, the court remarked, "I don't suppose you need to go into that at this time, do you?" indicating that in view of the pleadings, the court was of the opinion that it was not necessary for appellee to make that proof in chief.

However, the evidence tends to show that, on the date of the delivery of said policy, the insured was in good health, as that term is used. *Clover v. Modern Woodmen of America*, 142 App. 376-380; *Court of Honor v. Dinger*, 221 Ill. 176-181. Appellee testified: "Tony Alberico (agent of appellant) brought the policy to the store. When he was coming there, he was asking for my wife. I says, 'She is washing inside.' I say, 'I am going to get her.'"

Q. What was your wife doing that day?

A. Washing.

Q. In the back of the store?

A. In the back of the store, washing the clothes.

Q. Did Mr. Alberico go back ~~xx~~ to see her?

A. No, he left the policy and gone."

In *Punkhauser v. Illinois Bankers Life Assn.* 237 App. 95, in the court, in discussing the sufficiency of the evidence that an assured was in good health when the policy was delivered, at page 101 says:

"While, as contended by attorneys for appellant, the testimony of these lay witnesses may not be entitled to the same weight as that of experts, yet, in view of the fact that their testimony is based upon observation of the assured at the time in question, while the doctors is based upon a single examination made many months after that time, and in view of the further fact that the insured was examined, as the evidence discloses, by appellant's own examiner, whose report must have been satisfactory or the policy would not have been issued, and in further view of the fact that appellant's agent had the opportunity of seeing the insured and ascertaining her condition, and of inquiring about the same, before delivering the policy, we are not in a position to say that the jury were not justified in answering the special interrogatory to the effect that the insured was in good health when the policy was delivered."

On the whole record, we hold that appellant's second contention is not well taken.

Lastly, it is insisted that the court erred in refusing to admit in evidence the death certificate, in its entirety, said certificate stated, among other things; "The cause of death was as follows: Erysipelas. (Duration).....years..... months 6ds." The words "6ds." were excluded on the ground that the physician making the certificate had only attended the assured during the last four days of her life. The court did not err in this ruling, as the statement with reference to the duration of the assured's illness, was either a conclusion of the physician or was based on hearsay. In either event, it was not proper to go to the jury. *Henninger v. Inter-Ocean Casualty Co.* 217 App. 542-

in the back of the store, washing the clothes.
The Mr. Albers had been to see him.
He, he left the policy and home.

In *Wainwright v. Illinois Bankers Life Assn.*, 237 App. 23,
in the body, in discussing the question of the witness that an
assured was in good health when the policy was delivered, as here
101 says:

"While, as contended by attorneys for appellant, the testi-
mony of these lay witnesses may not be entitled to the same weight
as that of experts, yet, in view of the fact that their testimony is
based upon observation of the assured at the time in question, while
the doctors is based upon a single examination made many months after
that time, and in view of the further fact that the insured was
examined, as the evidence discloses, by appellant's own examiner,
whose report must have been satisfactory or the policy would not have
been issued, and in further view of the fact that appellant's agent
had the opportunity of seeing the insured and ascertaining her con-
dition, and of reporting about the same, before delivering the policy,
we are not in a position to say that the jury were not justified in
answering the special interrogatory to the effect that the insured
was in good health when the policy was delivered."
On the whole record, we hold that appellant's second con-
clusion is not well taken.

Lastly, it is insisted that the court erred in refusing
to admit in evidence the death certificate, in its entirety, and
that the physician making the certificate had only attended the
decedent during the last four days of her life. The court did not
err in this ruling, as the statement with reference to the duration
of the decedent's illness, was either a conclusion of the physician
or was based on hearsay. In either event, it was not proper to go
to the jury. *Wainwright v. Inter-Ocean Casualty Co.*, 237 App. 23-24.

548; Bishop v. Chicago C. R. Co., 204 App. 286-287.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

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STATE OF ILLINOIS,

SECOND DISTRICT

ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fourth day of February, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 657'

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 3 1930 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

| | | |
|--------------------------------------|---|------------------|
| Hydro-Stone Corporation of Illinois, | : | |
| a corporation, et al, | : | |
| Defendant in Error, | : | |
| | : | |
| vs. | : | Error to Circuit |
| | : | Court of Kane |
| | : | County. |
| B. P. Alschuler, et al, as trustees | : | |
| of the Masonic Temple Associa- | : | |
| tion of Aurora, Illinois, et al, | : | |
| Complainants in Error, | : | |

Jones J;

Complainant, as successor to The Hydro Stone Products Company, filed a bill as a sub-contractor under Holm-Page Company, against the defendants to foreclose a mechanic's lien. A decree was rendered in its favor and a sale of the property involved was had pursuant to said decree. This writ of error is prosecuted by the trustees of the Masonic Temple Association only. Defendant in error will be referred to as complainant and complainants in error will be referred to as defendants.

It is insisted that the original bill did not state a cause of action in that it did not allege (a) completion or performance of the contract, (b) that there were any monies due or to become due the Holm-Page Company, original contractor, at the time of the service of the sub-contractor's notice, or if none, that the owner had wrongfully paid out such monies, (c) that there was any original contract with the Board of Masonic Trustees, or that said contract between the Holm-Page Company and the Hydro-Stone Products Company was made or entered into pursuant to or by authority of any contract between said trustees and the Holm-Page Company, or that the Holm-Page Company was the original contractor or held any contractual relations with the Board of Masonic Trustees.

The original bill alleged that an account of all materials furnished is shown by Exhibit "A", attached to and made a part of the bill, and that the materials were delivered under the contract

County of Kane
Court of Appeals
Error to Circuit

Hydro-Stone Corporation of Illinois,
a corporation, et al,
Defendant in Error,
vs.
J. F. Alschuler, et al, as trustees
of the Masonic Temple Associa-
tion of Aurora, Illinois, et al,
Complainants in Error.

Page 7;

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A decree was rendered in its favor and a sale of the property
thereon was had pursuant to said decree. This writ of error
is presented by the trustees of the Masonic Temple Association
only. Defendant in error will be referred to as complainant
and complainants in error will be referred to as defendants.
It is insisted that the original bill did not state
a cause of action in that it did not allege (a) completion or
performance of the contract, (b) that there were any monies
due or to become due the Holm-Page Company, original contractor,
at the time of the service of the sub-contractor's notice, or
in time, that the money was rightfully due and owing.
That there was any original contract with the Board of Masonic
Trustees, or that said contract between the Holm-Page Company and
the Hydro-Stone Products Company was made or entered into
pursuant to or by authority of any contract between said trustees
and the Holm-Page Company, or that the Holm-Page Company was the
original contractor or held any contractual relations with the

Board of Masonic Trustees.

The original bill alleged that an account of all materials
furnished is shown by Exhibit "A", attached to and made a part of
the bill, and that the materials were delivered under the contract

from October 30, 1922 to December 3, 1923. The allegation that the furnishing of such materials was a complete performance by the Hydro-Stone Products Company of everything to be done by it under said contract and subsequent additions thereto was a sufficient allegations of completion and of the date of completion. (Beaudry v. Bell, 250 Ill. App. 468; Smith v. Adcock, 209 id. 277.)

A demurrer was filed to the original bill, but was withdrawn without any action having been taken thereon. It was conceded on the oral argument that the amended bill thereafter filed did state a cause of action. Where the sufficiency of all allegations of a bill of complaint is not duly tested by demurrer, all reasonable intendments will, after final decree, be indulged in support of the pleadings. (Hill v. Hill, 56 So. 941; 62 Fla. 493; 39 L. R. A. (N. S.) 1117; Bowen v. Grace, 59 So. 563; 64 Fla. 28; 21 C. J. Equity 405). The materials to be furnished, the parties, the property, and the relief asked for are the same in each bill. While the original bill is a defective statement of the cause of action set forth in the amended bill, nevertheless, both bills set out the same cause of action, and therefore the amended bill is not obnoxious to the statute of limitations. (Eisendrath v. Gebhardt, 124 Ill. App. 325, affirmed 222 Ill. 113; Miller v. Calumet Lumber and Manufacturing Company, 121 Ill. App. 56.)

It is contended that the decree is based on both the original and the amended bill and is therefore erroneous. Defendants admitted on the oral argument that the amended bill was sufficient. That being true, it is immaterial that the original bill was referred to in the decree. The amended bill superseded the original bill and the reference to the original bill is surplusage, and the defendants were not harmed by the recital.

It is urged that no proper service was had on the "unknown" defendants. The law requires two affidavits, or perhaps one affidavit covering two subjects, to be filed as to such defendants. The first is necessary under Sec. 7 of the Practice Act, so that persons whose names are unknown may be made defendants under the style and description of unknown owners, etc.

(Deamery v. Bell, 350 Ill. App. 482; Smith v. Adcock, 309 Id. 377.)

[illegible]

It is contended that the decree is based on both the original and the amended bill and is therefore erroneous. Defendant admitted on the oral argument that the amended bill was admitted. That being true, it is immaterial that the original bill was referred to in the decree. The amended bill superseded the original bill and the reference to the original bill is immaterial. The defendants were not bound by the original.

It is urged that no proper service was had on the "known" defendants. The law requires two affidavits, or one affidavit covering two subjects, to be filed as to each defendant. The first is necessary under Sec. 7 of the Practice Act, so that persons whose names are unknown may be made defendants.

The second is necessary for publication notice under Sec. 12 of said Act. (Breed v. Baird, 139 Ill. App. 15.) An affidavit, as provided for by Sec. 7, was made and is a part of the record in this case, but it is claimed no affidavit of non-residence, as required by Sec. 12, was filed.

This claim is based on the recitals of the Clerk's certificate attached to the record, stating that the record is a full, true, and complete copy of certain files enumerating them, among which is an affidavit filed April 1, 1924. The affidavit discloses that it was made to comply with the requirements of Sec. 7. The certificate further states that this is the only affidavit filed for process as to said unknown owners and holders. The certificate of publication, which is also included in the record, expressly states that "The requisite affidavit having been properly filed, notice is hereby given to * * * the unknown owner or owners, holder or holders of notes." The order of the court defaulting the unknown owners and holders found that "the requisite affidavits" had been filed; and that due publication notice had been given to said defendants, the unknown owner or owners, and each of them. The affidavits mentioned in this order can refer only to the affidavits required by Sec. 7 and Sec. 12. Hence, it appears from the finding of the Court that the affidavit of non-residence was on file at the time the default of the unknown holders and owners was entered. This finding cannot be impeached or contradicted by a certificate of the Clerk subsequently made. (Brown v. Miner, 128, Ill. 148.)

It is insisted that the Notary Public did not affix his seal to the affidavit as to the unknown owners; that he was a Notary Public of Cook County, whereas the proceedings were in Kane County; and that the circuit court of Kane county would not take judicial notice that such person was a Notary Public. However that may be, the certificate of evidence in this case does not purport to contain all of the evidence. Proof of the official character of the Notary Public could have been made by his commission or by the record thereof. (Stout v. Slattery, 12 Ill. 162; Rowley v. Berrian, 12 id 200; Dyer v. Flint, 21 Ill. 80.) It is to be noted that the only

The record is necessary for publication notice under Sec. 12 of
said Act. (Brown v. Miner, 12 Ill. 148.) An affidavit
was made for by Sec. 7, was made and is a part of the record
in this case, but it is claimed no affidavit of non-residence,
as required by Sec. 12, was filed.

This claim is based on the contents of the record.

Certificate attached to the record, stating that the record is
a full, true, and complete copy of certain files enumerating

them, among which is an affidavit filed April 1, 1884. The

affidavit discloses that it was made to comply with the require-
ments of Sec. 7. The certificate further states that this is

the only affidavit filed for process as to said unknown owners

and holders. The certificate of publication, which is also

attached to the record, expressly states that the publication

affidavit having been properly filed, notice is hereby given to
* * * the unknown owner or owners, holder or holders of notes."

The order of the court requiring the unknown owners and holders
to show that "the requisite affidavits" had been filed; and that

the publication notice had been given as said defendant, the

unknown owner or owners, and each of them. The affidavit's motion-
ed in this order can refer only to the affidavits required by Sec.

7 and Sec. 12. Hence, it appears from the finding of the court

that the affidavit of non-residence was on file at the time the

record of the unknown holders and owners was entered. This finding

cannot be impeached or contradicted by a certificate of the clerk

subsequently made. (Brown v. Miner, 12 Ill. 148.)

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the certificate of evidence in this case does not purport to con-

firm all of the evidence. Proof of the official character of the

Notary Public could have been made by his commission or by the record

showing that he was a Notary Public. (Brown v. Miner, 12 Ill. 148.) It is to be noted that the only

proof of absence of the notary's seal is that the clerk of the trial court so states in the record, and such a statement is not sufficient to overcome the finding of the Chancellor that due notice by publication was had. (Brown v. Miner, supra.)

No question was raised before the chancellor about service on the unknown owners or holders, although their default was entered October 22, 1928 and the decree was not entered until November 2, 1930. Plaintiffs in error were personally served and actively participated in the proceedings. If they felt that the court was without jurisdiction, they should have raised the point in apt time. They have not been injuriously affected by the order of default and whatever error may have been committed with respect to the publication notice, they are in no position to complain about it. (Donham v. Joyce, 257 Ill. 112.)

We do not deem the errors assigned to be well taken and the decree is therefore affirmed.

Decree affirmed.

...of absence of the ... in the ... of the ...
... in the ... and such a statement is not sufficient
... the ... of the ... that the notice by public
... (known v. Miner, supra.)

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October 11, 1928 and the ... was ...
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112.)

We do not deem the errors claimed to be well taken

and the decree is affirmed.

COPIES ATTACHED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above-
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



762 AT A TERM OF THE APPELLATE COURT, 7

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 657

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 11 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District

October Term, A.D., 1929

| | | |
|--------------------------|---|------------------|
| S. E. ALLEN, |) | |
| |) | |
| Appellee |) | |
| |) | |
| v. |) | Appeal from the |
| |) | Circuit Court of |
| ALBERT JOHNSON, as |) | Boone County. |
| Sheriff of Boone County, |) | |
| Illinois, |) | |
| |) | |
| Appellant |) | |

OPINION by BOGGS, P. J.

Appellee brought suit in the circuit court of Boone County against appellant to recover wages alleged to be owing by one H. J. Sturges.

The declaration consists of three counts. The first count charges that the business of Sturges, a farmer, was suspended by the action of his creditors; that at said time he was indebted to appellee for wages as a farm laborer, in the sum of \$33.00, which indebtedness "was then and there a preferred claim against the property of said Sturges"; that "one John Fair (who was then and there the predecessor in office as sheriff of said county of the said defendant Albert Johnson), had as such sheriff an execution * * * * in favor of one George W. Meyers and against said Sturges, dated October 30, 1926, and under which execution" he, as sheriff, "had seized the property of Sturges"; that, on November 24, 1926, being within ten days after said seizure, appellee pre-

In The
APPELLATE COURT OF ILLINOIS
Second District

October Term, A.D., 1929

Appel from the
Circuit Court of
Boone County.

S. E. ALLEN,
Appellee
v.
ALBERT JOHNSON, as
Sheriff of Boone County,
Illinois,
Appellant

OPINION BY ROGGS, P. J.

Appellee brought suit in the circuit court of Boone
County against appellant to recover wages alleged to be owing by
one H. J. Sturges.

The declaration consists of three counts. The first
count charges that the business of Sturges, a farmer, was suspended
by the action of his creditors; that at said time he was indebted
to appellee for wages as a farm laborer, in the sum of \$285.00,
which indebtedness "was then and there a preferred claim against
the property of said Sturges"; that "was John J. Allen was then
and there the predecessor in office as sheriff of said county
of the said defendant Albert Johnson), and as such sheriff an
execution * * * in favor of one George W. Rogers and against said
Sturges, dated October 30, 1926, and under which execution he,
as sheriff, "had seized the property of Sturges"; that, on November
21, 1926, within ten days after said seizure, appellee pro-

sented to said sheriff a sworn statement of his claim, etc.; that said sheriff accepted said notice; that on December 6, 1926, at the expiration of the term of office of said Fair as sheriff, "said execution and statement were placed by operation of law in the hands of the defendant, Albert Johnson, as sheriff"; that appellant thereafter, on December 13, 1926, sold the property of said debtor under said execution," and realized therefrom a sum in excess of the amount of the wages aforesaid so due," etc.

The second and third counts are substantially similar, and charge that Fair, as such sheriff, "had in his possession an execution * * * against said H. J. Sturges, dated October 30, 1926, and that thereupon it became and was then and there the duty of the said John Fair, as sheriff, in case he seized the property of the said H. J. Sturges under said execution, to seize and take possession of said property in such an open, clear, unequivocal and pronounced manner as by such act to inform the plaintiff of the date and happening of that event; * * * that said Fair did not so seize and take said property," etc.; "that the plaintiff could not, and did not in fact ascertain the time or the fact of said seizure and being so uninformed, * * * on, to-wit: the 24th day of November A.D. 1926, and while said execution was in the hands of the said sheriff," appellee served upon said sheriff his statement of wages, etc.

To said declaration appellant filed the general issue and a special plea, avering that appellant posted notices and sold said property by virtue of said execution; "that he notified the said plaintiff in writing on December 16, 1926, that the claim of said plaintiff left in the office of the sheriff on the 24th day of November, 1926, * * * was not filed nor delivered by the said plaintiff within the time required by the statute of the State of Illinois, with reference to any of property or estate of the said H. J. Sturges, or the proceeds thereof which have come to the hands of this defendant since becoming sheriff or through action or writs coming to the hands of said defendant as successor of John Fair, Sheriff, and the defendant also notified the said plaintiff that

... to said sheriff a sworn statement of his claim, etc.; that
... sheriff accepted said notice; that on December 6, 1936, at the
... of the term of office of said Tair as sheriff, "said
... and a statement were placed by operation of law in the hands
of the defendant, Albert Johnson, as sheriff; that applicant there-
after, on December 13, 1936, sold the property of said debtor under
"said sheriff," and realized therefrom a sum in excess of the amount
of the wages aforesaid so due," etc.

The second and third counts are substantially similar,
and charge that Tair, as such sheriff, "had in his possession an
execution * * * against said H. J. Sturges, dated October 30, 1936,
and that thereupon it became and was then and there the duty of
the said John Tair, as sheriff, in case he seized the property of
the said H. J. Sturges under said execution, to seize and take
possession of said property in such an open, clear, unequivocal and
pronounced manner as by such act to inform the plaintiff of the
date and happening of that event; * * * that said Tair did not so
seize and take said property," etc.; "that the plaintiff could
not, and did not in fact ascertain the time or the fact of seizure
and being so uninformed, * * * on, to-wit: the 24th day of November
1936, and while said execution was in the hands of the said
"sheriff," appellee served upon said sheriff his statement of wages,

To said execution appellant filed the general return
and a special plea, averring that appellant posted notice and sold
said property by virtue of said execution; "that he notified the said
plaintiff in writing on December 16, 1936, that said return of said
plaintiff filed in the office of the sheriff on the 24th day of
November, 1936, * * * was not filed nor delivered by the said
plaintiff within the time required by the statute of the State of
Illinois, with reference to any of property or estate of the said
H. J. Sturges, * * * the proceeds thereof which have come to the hands
of said defendant since becoming sheriff or through action on writs
issued to the hands of said defendant as successor of John Tair,
and the defendant also notified the said plaintiff that

this defendant was obliged to decline to hold any such money or pay the same to the said plaintiff on account of ^{the} filing of said alleged statement, &" etc., concluding with a verification.

Appellant replied, traversing said plea. A trial was had, resulting in a verdict and judgment in favor of appellee for \$33.00. To reverse said judgment, this appeal is prosecuted.

It is first contended that the declaration is so defective that it will not sustain the judgment.

After judgment, the pleading upon which such judgment is based is liberally construed, for the purpose of sustaining the judgment. *Chicago & A. R. Co. v. Clausen*, 173 Ill. 100-103; *Clawiter v. Jones*, 219 Ill. 626-629; *Sargent Co. v. Baublis*, 215 Ill. 428-430; *Diamond Glue Co. v. Wietzychowski*, 227 Ill. 538-548; *Plew v. Board*, 274 Ill. 232-234.

After verdict and judgment, every reasonable inference and intendment goes in support of the declaration. *Gerke v. Bancker*, 158 Ill. 375-379; *Willis Coal & Mining Co. v. Grizzell*, 100 App. 480-485.

Appellant having filed said pleas without testing the sufficiency of said declaration by demurrer, under the foregoing authorities, the same was clearly sufficient after verdict.

It is next contended that the evidence fails to disclose any wrong-doing on the part of appellant as sheriff; "that, if there was any wrong-doing whatever, it was the wrong-doing of John Fair as sheriff, or of Deputy Moore."

It is not charged that either Fair or appellant was guilty of any malfeasance. The charge is that Fair did not take possession of the property in question under said purported levy, or, if it be held that he did so take possession thereof, that such taking was not of the character required as against innocent third parties.

On November 29, a part of said property was sold under a chattel mortgage held by the First National Bank of Belvidere. Sidney Sturges, a son of the judgment debtor, testified that, some fourteen days prior to said sale, he was made custodian of said property under said chattel mortgage; that the property was not

the defendant was obliged to hold any such money as
 the
 was due to the said plaintiff on account of filing of said
 alleged statement, etc., concluding with a verification.
 Appellate court, however, said that a trial was had,
 resulting in a verdict and judgment in favor of appellee for \$383.00.
 To reverse said judgment, this appeal is prosecuted.
 It is first contended that the declaration is as defective
 that it will not sustain the judgment.

After judgment, the pleading upon which such judgment is
 based is liberally construed, for the purpose of sustaining the
 judgment. Chicago & A. R. Co. v. Glascock, 173 Ill. 100-103;
 Jewett v. Jones, 219 Ill. 326-329; Sargent Co. v. Republic, 213
 Ill. 423-430; Diamond Gine Co. v. Wietzysnowski, 227 Ill. 323-
 325; Plev v. Board, 274 Ill. 323-324.

It is next contended that the declaration is defective
 and interment goes in support of the declaration. Burke v. Banker,
 213 Ill. 375-379; Willis Coal & Mining Co. v. Grinnell, 100 App.
 410-412.

Appellant having filed said plea without testing the
 sufficiency of said declaration by demurrer, under the provisions
 of the rules, the same was properly sustained after hearing.
 It is next contended that the evidence fails to sustain
 the wrong-doing on the part of appellant as sheriff; "that, if
 there was any wrong-doing whatever, it was the wrong-doing of John
 Fair as sheriff, or of Deputy Moore."

It is not charged that either Fair or appellant was guilty
 of any malfeasance. The charge is that Fair did not take possession
 of the property in question until sold pursuant to law, and it is
 held that he did so take possession thereof, that such taking
 was not of the character required to sustain appellant's claim.

On November 23, a part of said property was sold under
 a chattel mortgage held by the First National Bank of Milwaukee.
 Edward Hughes, a son of the judgment debtor, testified that, on
 November 23, prior to said sale, he was made a stationer of said
 property under said chattel mortgage; that the property was not

removed; that he and his father fed and milked the cows, separated the milk and sold the part going to his father, and otherwise exercised dominion over said property, the same as prior to the purported levy. The father testified that no possession was taken under said purported levy; that the property was left on the place, and that he, in effect, remained in control of the same until the sale on November 29.

The evidence on behalf of appellant is to the effect that L. A. Moore, a deputy sheriff under John Fair, served said execution on Sturges on November 2, at which time he made a list of the property, etc. Moore testified that he did not remove the property and did not put anyone in charge of it; that he did not make the return on the execution and did not know what became of it; that he visited the Sturges farm from time to time after serving the execution, but that, on these several visits, he was looking after certain other executions and foreclosures of chattel mortgages which he had in his possession. No claim was made by Moore that he fed said stock or had it fed, or that he placed anyone in custody of the same.

The question for our determination is, therefore, as to whether appellee gave notice of his claim within ten days from the seizure of said property, as contemplated by section 1, chapter 72, Cahill's Statutes. That appellee had a claim for labor of \$383.00 is not questioned, and that he gave appellant notice thereof on November 24, 1926, is not questioned, but is admitted by the pleadings.

Appellant contends that the purported levy on November 2 amounted to a seizure of the property. This point is not well taken. In order to make a valid levy as against third parties, the officer making the levy must so deal with the possession of the property as to render himself liable in trespass if his action is without authority of law. *Minor v. Herriford*, 25, Ill. 344-346; *Davidson v. Waldron*, 31 Ill. 120-130; *Logsdon v. Spivey*, 54 Ill. 104-106; *Windmuller v. Chapman*, 139 Ill. 163-164; *Williams v. Head* 219 App. 5910.

...that he and his father fed and milked the cows, separated the milk and sold the part going to his father, and otherwise exercised dominion over said property, the same as prior to the purported levy. The father testified that no possession was taken under said purported levy; and the property was left in the place, and that no, in effect, remained in control of the same until the sale on

November 29.

The evidence on behalf of appellant is to the effect that J. A. Moore, a deputy sheriff under John Blair, served said execution on Sturges on November 8, at which time he made a list of the property, etc. Moore testified that he did not make the levy, and did not put anyone in charge of it; that he did not make the return on the execution and did not know what became of it; that he visited the Sturges farm from time to time after serving the execution, but that, on these several visits, he was looking after certain other executions and foreclosures of mortgages, and that he had in his possession. No claim was made by Moore that he fed said stock or had it fed, or that he placed anyone in custody of

the same.

The question for our determination is, therefore, as to whether appellee gave notice of his claim within ten days from the seizure of said property, as contemplated by section 1, chapter 73, Cahill's Statutes. That appellee had a claim for labor of \$385.00 is not questioned, and that he gave appellant notice thereof on November 24, 1925, is not questioned, but is admitted by the

appellee.

Appellant contends that the purported levy on November 8 amounted to a seizure of the property. This point is not well taken. In order to make a valid levy on against third parties, the officer making the levy must so deal with the possession of the property as to render himself liable in trespass if his action is without authority of law. Minor v. Eastland, 22, 111. 504-505; Devlin v. Wadston, 21, 111. 120-123; Logan v. Spivey, 24, 111. 106-107; Winkler v. Graham, 122, 111. 103-104; Williams v. ...

110 App. 5-10.

Said execution bears the following endorsement:

"To H. J. Sturges, Defendant:

"You are hereby notified that unless you do, ~~within~~
within ten days from the time you receive this notice, ~~make and de-~~
liver to me or to the Clerk of the Circuit Court of said County,
a schedule of all your personal property, the same will be subject
to levy and sale to satisfy the demand of the within George W. Meyers.
Dated this 2nd day of November.

"John Fair, Sheriff, by L. A. Moore,
Dept."

While the levy is dated as of November 2, the execution was not returned to the office of the circuit clerk until December 18, 1928, and, under the law, no return was made prior to that date. Nelson v. Cook, 19 Ill. 440-455; Douglas v. Whiting, 23 Ill. 302-366; Hogue v. Corbit, 156 Ill. 540-548. It cannot be held, therefore, that the return of the officer was any notice to appellee.

If the property was ever seized under said execution, it was after November 29th, the day of the sale under said chattel mortgage. If it can be said that Sidney Sturges was a custodian of said property, it was under the holder of said chattel mortgage, and his custody did not begin before November 15. Appellee's claim was presented within ten days of this date. It follows that the jury were warranted in finding that appellee was entitled to be preferred as a creditor of Sturges, as against the holder of said execution.

Some effort was made by appellant to show that appellee was advised by William L. Pierce, attorney for Meyers, to file his claim within ten days after November 2, 1928. The evidence as to whether any such advice was given appellee is conflicting. Even if such advice were given, Pierce was not representing appellant or John Fair, the then sheriff. Notice from Pierce, the attorney for Meyers, would not deprive appellee of his rights under the statute.

It is next insisted that the court erred in giving appellant's first given instruction. This instruction stated a correct principle of law, applicable to the facts, and the court did not err in giving the same.

John H. Sturges, Defendant:

"You are hereby notified that unless you do, within

within ten days from the time you receive this notice, make and file

ever to me or to the Clerk of the Circuit Court of said County,

a schedule of all your personal property, the same will be subject

to levy and sale to satisfy the demand of the within George W. Meyers.

Signed with full power of attorney.

"John H. Sturges, Sheriff, by E. A. Moore,

While the levy is dated as of November 2, the execution

was not returned to the office of the sheriff until December
12, 1922, and, under the law, no return was made prior to that date.

Meigs v. Cook, 19 Ill. 440-452; Douglas v. Whiting, 22 Ill. 528-

530; Hogue v. Corbit, 122 Ill. 540-542. It cannot be held, there-

fore, that the return of the officer was any notice to appellee.

If the property was ever seized under said execution, it

was after November 22d, the day of the sale under said execution.

Moreover, if it can be said that Sidney Sturges was a creditor of

said property, it was under the holder of said chattel mortgage, and

his custody did not begin before November 12. Appellee's claim was

presented within ten days of this date. It follows that the jury

were warranted in finding that appellee was entitled to be returned

as a creditor of Sturges, as against the holder of said execution.

Some effort was made by appellant to show that appellee

was advised by William J. Taylor, attorney for Sturges, in this

claim within ten days after November 2, 1922. The evidence as to

whether any such advice was given appellee is conflicting. Even

if such advice were given, there was no representing appellant

at the time, the then sheriff. Notice from Sturges, the attorney

for Meyers, would not deprive appellee of his rights under the

statute.

It is next insisted that the court erred in giving appellant's

first given instruction. This instruction stated a correct prin-

ciple of law, applicable to the facts, and the court did not er-

It is also insisted that the court erred in refusing to give appellee's first, second, third and fourth refused instructions. The first, third and fourth refused instructions, so far as they stated correct principles of law, were covered by instructions given on behalf of appellant. The second refused instruction did not state a correct principle of law, and the court did not err in refusing the same.

It was further contended that the verdict was against the manifest weight of the evidence and that a new trial should be granted. The evidence fully warranted the verdict returned, and the court did not err in so holding.

For the reasons above set forth the judgment of the trial court will be affirmed.

Judgment affirmed.

It is also insisted that the court erred in refusing to
first appoint a first, second, third and fourth learned
counselors, as set as they
first, third and fourth learned counselors, as set as they
stated correct principles of law, were covered by instructions given
in point of law. The court refused to do so.
state a correct principle of law, and the court did not err in re-
fusing the same.

It was further contended that the verdict was against the
manifest weight of the evidence and that a new trial should be granted.
The evidence fully warranted the verdict returned, and the court did
not err in so holding.

The persons above set forth the judgment of the trial
court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

76-5 AT A TERM OF THE APPELLATE COURT, 7

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 1.A. 657

BE IT REMEMBERED, that afterwards, to-wit: On

1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
Appellate Court of Illinois
Second District
February Term, A.D. 1939

- - - - -

ASHLEY B. CUBBERLEY,
Appellant,
-vs-
DANIEL WEBSTER, et al.,
Appellees.

Appeal from the
Circuit Court of
Kankakee County.

- - - - -

OPINION by BOGGS, P. J.

- - - - -

Appellant filed a bill in the circuit court of Kankakee county which, as finally amended, set forth among other things that on March 17, 1927, appellant purchased from appellees Daniel Webster and Lloyd A. Bartholic, as the "Kankakee Automobile Mart", a Moon coach "for \$1,035.00, of which \$435.00 was allowed on appellant's Essex coach turned in, and \$600.00 by note; * * * that seller in arranging for deferred payment of \$600 made a charge of \$102, making a total of \$702, and made a judgment note for \$702 payable in 16 monthly payments of \$43.88 each"; that said note was secured by chattel mortgage in which it was provided that premiums for insurance may become a part of debt.

"That the seller represented that the \$102 was a manufacturer's finance charge, and was for interest and insurance, and that seller had insured said Moon coach against fire and theft; * * * that on November 21, 1928, the Moon coach burned accidentally, and then orator demanded that insurance be adjusted, and seller represented that there was no insurance * * * that orator does not know whether seller did or did not insure, but seeks to discover the same in this suit, that orator's actual loss was about \$900.

In The
 Appellate Court of Illinois
 Second District
 February Term, A.D. 1930

Appeal from the
 Circuit Court of
 Hamilton County.

AMANDA E. CUBBERLEY,
 Appellant,
 -vs-
 DANIEL WEBSTER, et al.,
 Appellees.

OPINION BY HOGGS, P. J.

Appellant filed a bill in the circuit court of Hamilton County which, as finally amended, set forth among other things that on March 17, 1927, appellant purchased from appellees Daniel Webster and Lloyd A. Webster, as the "Hamilton Automobile Sales Company," a Moon coach "for \$1,035.00, of which \$455.00 was allowed on appellant's Essex coach turned in, and \$600.00 by note; * * * that seller in extending for deferred payment of \$600 made a charge of \$100, adding a total of \$700, and made a payment note for \$700 payable in 10 monthly payments of \$70.00 each; that said note was secured by chattel mortgage in which it was provided that Hamilton F. Insurance not become a part of debt. "That the seller represented that the \$100 was a man-tenant's license charge, and was for interest and insurance, and that seller had insured said Moon coach against fire and theft; * * * that on November 21, 1928, the Moon coach burned accidentally, and soon thereafter demanded that insurance be adjusted, and seller represented that there was no insurance * * * that orator does not know whether seller did or did not insure, but seeks to discover the sum to which orator's actual loss was about \$600.

That seller represented to orator after the fire that note and mortgage had been turned over to the First Trust & Savings Bank or to Louis E. Beckman, agent; that orator seeks to discover the holder of note and mortgage; that orator is employed by I. C. Railroad as brakeman, and in case of garnishment or notice of garnishment of his wages or attachment would render orator's tenure of employment insecure * * * that defendants threatened to put note in judgment and if they did it would hurt orator's credit * * * that orator is informed and believes that Webster and Bartholic are insolvent; that since this suit was started, defendants foreclosed the mortgage and represented that remains of car were sold for \$25, and that the next step would be to put note in judgment."

Webster, Bartholic, First Trust & Savings Bank and Beckman were made parties defendant. The bill prays discovery "as to who is the real owner of note, etc., and whether holder purchased same for value whether the auto was insured against fire and if so, in what company and what are other details, and if insurance has been collected, an accounting is prayed; and that defendants be required to pay orator the fire loss sustained; that defendants be restrained from putting note in judgment and from attachment, garnishment or steps leading thereto; that orator have general relief."

Thereafter, on February 27, 1928, a supplemental bill was filed, setting forth that on January 8, 1928, judgment was taken against him on said note for \$406.15, which included \$87.69 attorney's fees; that same was taken in the name of appellee bank; that "real payees on note are Webster and Bartholic as Milwaukee Automobile Mart." Said supplemental bill prays that said judgment be decreed void and, if not null and void, that it be decreed to be subject to orator's equities, and that bank be enjoined from proceeding with enforcement of said judgment."

A demurrer to the amended and supplemental bill was sustained and, appellant electing to abide the same, a decree was entered, dismissing said bill for want of equity. An appeal was perfected to this court. On the failure of appellees to file briefs the decree was reversed pro forma. Thereafter an answer was filed

That either respondent to either effect the life insurance and
mortgage has been turned over to the life insurance company and
to Lewis T. Bennett, trustee, that either party be allowed the

holder of note and mortgage; that either is employed by L. G.

Wainwright as broker, and in case of assignment or notice of

assignment of his wages or attachment would render either's tenure
of employment insecure * * * that defendant is threatened to put note

in judgment and if they did it would hurt either's credit * * *

that either is informed and believes that Webster and Bartholomew
are insolvent; that since this suit was started, defendant's fore-
closed the mortgage and represented that remains of car were sold
for \$25, and that the next step would be to put note in judgment."
Webster, Bartholomew, First Trust & Savings Bank and Rock-

man were made parties defendant. The bill prays discovery "as

to who is the real owner of note, etc., and whether holder purchased
same for value whether the note was issued against time and if so,

in what company and what are other details, and if insurance has

been collected, an accounting is prayed; and that defendant be

required to pay either the life loss sustained; that defendant be

prevented from putting note in judgment and from attachment, and

assignment or steps leading thereto; that either have general relief."

Thereafter, on February 27, 1928, a supplemental bill was

filed, setting forth facts on January 2, 1928, defendant was sworn

and that him on said note for \$400.00, which included \$75.00 attorney's
fees; that same was taken in the name of appellee bank; that "real

names on note are Webster and Bartholomew as Kansas City Automobile

Lease." Said supplemental bill prays that said judgment be decreed

and that it may well and void; that it be reversed or be affirmed as

either's equities, and that bank be enjoined from proceeding with

attachment of said judgment."

A demurrer to the amended and supplemental bill was over-

ruled and, appellant electing to abide the same, a decree was

entered, dismissing said bill for want of equity. An appeal was

docketed on this case. On the return of appeal to this court
the parties were notified and the case was called.

by appellee bank, setting forth that, for a valuable consideration, they purchased the note in question; that for a time the installments thereon were paid by appellant; that thereafter he ceased to make such payments and the chattel mortgage securing said note was foreclosed and the note placed in judgment, etc. Appellee Beckman answered, setting forth among other things that appellee bank purchased said note and that said note, with the chattel mortgage securing the same, was assigned to the bank and that it became the owner thereof for value before maturity. Appellees Webster and Bartholic answered that on March 1, 1927, appellant purchased the automobile in question and "deny that a charge of \$702 was made against Cubberley as manufacturer's finance charge, and for interest and insurance, and deny that salesman made any such representation"; admits that on November 21, 1927, the automobile was burned and that appellee "demanded insurance and refused to make further payments; that immediately after sale, the note given by complainant for deferred payments thereon was sold to First Trust & Savings Bank, and that chattel mortgage was transferred to Beckman, cashier of bank, as agent, and that they obtained the money thereon. * * *

Deny insolvency. * * * Deny that they insured the car for \$1,000 against fire and theft, or that they represented same to Cubberley." Admits "that several applications were made, addressed to finance corporations, and each refused to take the papers; that then at Cubberley's earnest solicitations defendants agreed to finance the proposition themselves if Cubberley would make payment of \$45.82 per month and allow \$102 to cover interest charges and what discount a bank would charge in buying the papers and the expenses of making out the papers and negotiating the same; that the deal was consummated on the said terms; * * * that as soon as car was delivered to Cubberley, note and mortgage was taken to First Trust & Savings Bank and sold to them in the usual course of trade and long before note was due."

The cause was heard in open court, a finding was made in favor of appellees and the bill was dismissed for want of equity.

...the bank, setting forth that, for a valuable consideration, ...
...the note in question; that for a time the installment ...
...were paid by appellant; that thereafter he ceased to make ...
...and the chattel mortgage securing said note was fore-
...and the note placed in judgment, etc. Appellee Deegan ...
...setting forth among other things that appellee bank pur-
...and that said note, with the chattel mortgage ...
...the same, was assigned to the bank and that it became the ...
...for interest for value before maturity. Appellee Deegan ...
...answered that on March 1, 1927, appellant purchased the ...
...in question and "deny that a charge of \$702 was made ...
...appellant as manufacturer's finance charge, and for interest ...
...and deny that appellant made any such representation"; ...
...that on November 21, 1927, the appellant was notified and ...
...demanded insurance and refused to make further payments; ...
...the note given by complainant for ...
...that immediately after sale, the note given by complainant for ...
...that appellant thereon was said to have been a ...
...and that appellant was notified to ...
...and that they obtained the money thereon. ...
...Deny that they insured the car for \$1,000 ...
...or that they represented same to Garberley." ...
...that several applications were made, addressed to finance ...
...and each refused to take the papers; that then at ...
...and each refused to take the papers; that then at ...
...to cover interest charges and ...
...and allow \$102 to cover interest charges and ...
...and the ...
...of making out the papers and negotiating the same; that ...
...on the said terms; * * * that as soon as ...
...and sold to them in the usual course ...
...and long before note was due."

To reverse said decree, this appeal is prosecuted.

It is first contended by appellant that the law governing this suit was determined on the former appeal. This point is not well taken. On the former appeal, the decree was reversed pro forma. That being the state of the record, the rights of the parties, so far as the law is concerned, were not affected by the proceedings on the former ~~appeal~~ appeal. See *Guild v. Guild et al.*, 127 Ill.523-530.

It is next insisted that, without reference to the former appeal, the court erred in dismissing said bills. The alleged grounds for equitable relief are that appellees Webster and Bartholic made a charge of \$102 against appellant to cover insurance, and that they failed to protect appellant by such insurance, etc.; that upon ascertaining such failure, appellant took the matter up with appellees Webster and Bartholic and that, not being able to arrange with them in reference thereto, he ceased to make payments on said note; that thereupon the chattel mortgage securing the same was foreclosed and judgment was taken on said note.

Appellant testified in his own behalf and stated that he knew said note was held by appellee bank. He also testified in substance that he was informed after said fire and before the filing of said bill that there was no insurance on said automobile. He also testified that he ceased paying on said note after said fire, and after he ascertained that there was no insurance.

While the judgment against appellant for \$406.15 has never been satisfied of record, Beckman, cashier of appellee bank, testified that the note on which said judgment was based was paid by Webster, and while the record fails to disclose an assignment thereof to Webster or to Webster and Bartholic, they would be subrogated to the rights of appellee bank therein. Whatever rights, if any, appellant may have against Webster and Bartholic, they are cognizable in a court of law, where the facts may be tried by a jury. We see no reason why this may not all be litigated in the suit now pending, instituted by appellee bank, and in which Webster and Bartholic are the real persons in interest. It therefore follows that the court did not err in dismissing said bill.

It is also pointed out by the law governing

the will was admitted in the former case. This will be

the same. In the latter case, the will was admitted

and in the case of the present, the will of the testator,

it is the law in substance, and not in the words.

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it is the law in substance, and not in the words.

It is also pointed out by the law governing

the will was admitted in the former case. This will be

the same. In the latter case, the will was admitted

bill.

For the reasons above set forth, the decree of the trial court will be affirmed.

Decree affirmed.

Point out to correct the defect for every member of the

Committee of the

Committee

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty _____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 657

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 11 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

LILLIAN MAE HASEL, by
H. E. Vogelsinger, Her next
friend,

Appellant

VS.

ESTATE OF A. B. CLAUDON, Jr.,

Appellee

Appeal from the
Circuit Court of
Livingston County.

JONES J:

Andrew K. Kasel was appointed guardian of his daughter, Lillian Mae Hasel, prior to August 6, 1913. As such guardian he deposited his ward's funds in the private bank of A. E. Claudon at Fairbury, Illinois, and they were kept on deposit in said bank until the "Claudon State Bank" was organized in 1921. Thereafter they were kept on deposit in that bank. Claudon's son, A.E. Claudon, Jr., was assistant cashier of the private bank and cashier of the Claudon State Bank. When the Claudon State Bank was organized, it occupied the same building in which the private bank had been conducted and the name on the outside of the building was changed to Claudon State Bank.

In 1924 Hasel was required to furnish a new bond as guardian. He testified that he had gone to the "Fairbury Bank" and there arranged for a new bond if he would place his funds in that bank. He told A.B. Claudon, Jr. what the situation was, and Claudon said, "That is all right. We will take care of you.", whereupon Hasel replied, "All right leave it right here." On December 27, 1924, the new bond was executed with A.B. Claudon, Sr. and A. B. Claudon Jr. as sureties. At that time Hasel, as such guardian, had in his possession one certificate of deposit for \$850 dated March 27, 1924. When the new bond was executed, two more certificates of deposit, one for \$865 and the other for \$5,217 were issued, dated December 27, 1924, payable to Hasel as guardian. All three of the certificates were drawn on forms of the old private bank of A. B. Claudon Sr., and were signed, "A. B. Claudon Jr. A. Cashier". Hasel testified that he told

A. B. Claudon Jr. he would be required to account for five per cent interest on the money, and that the certificates were so drawn. On the day the new bond was given, Hasel filed a report as guardian, listing the certificates of deposit as having been issued by the Claudon State Bank. Attached to the report is a certificate reciting that "the balance on hand is represented by certificates of deposit on this bank as enumerated in the said report", and signed, "A. B. Claudon, Jr., Asst. Cashier Claudon State Bank."

On May 6, 1927, the Claudon State Bank was closed. A.D. Claudon Jr. died May 11, 1927, and the Illinois State Savings Bank was appointed receiver of the Claudon State Bank on June 15, 1927. The Claudon State Bank and the estate of A. B. Claudon Jr. are insolvent. A. B. Claudon Sr. has been adjudged a bankrupt. The claim in this case was filed in the county court against the estate of A. B. Claudon Jr. Accompanying the claim is a statement of H. E. Vogelsinger, claimant's next friend, alleging that on December 27, 1924, claimant had as her estate the sum of \$6,372 in money, and that by the connivance and co-operation of Hasel and the two Claudons, the same "was deposited in the bank then and there conducted in the City of Fairbury, Illinois, by the said A. B. Claudon Sr. and the said A. B. Claudon Jr.; * * * * * that thereafter and in the year 1927 the said bank so conducted by the said Claudons became insolvent and failed, by reason whereof the said A. K. Hasel, Guardian, has not since that time and is not now able to receive, collect, or account for said money, etc." The statement also recites that it was upon the consideration that the Claudons should have the monies deposited in their bank that they consented to and did become sureties on Hasel's bond, and that thereby they, with Hasel, became joint custodians of said funds.

The claim was allowed by the county court as a claim of the sixth class, and on appeal to the circuit court, a like judgment was entered. This appeal is prosecuted from that judgment. Appellant contends that A. B. Claudon Jr. was a trustee de son tort and that the claim should be allowed as of the fifth class.

A stipulation of record permitting the testimony of

A statement of record permitting the testimony of

and that the claim should be allowed as of the fifth class.

Appellant contends that A. B. Glandon Jr. was a trustee do non fact

and was entered. This appeal is presented for the purpose.

the sixth class, and on appeal to the circuit court, a life judg-

The claim was allowed by the county court as a claim of

Hasel, became joint custodians of said funds.

become trustees on Hasel's bond, and that thereby they, with

the monies deposited in their bank that they consented to and did

claim that it was upon the consideration that the Glandons should have

collected, or account for said money, etc. The statement also re-

Glandon, has not since that time and is not now able to receive,

became insolvent and failed, by reason whereof the said A. B. Hasel,

the year 1927 the said bank so conducted by the said Glandons

and the said A. B. Glandon Jr.; * * * that thereafter and in

in the City of Fairbury, Illinois, by the said A. B. Glandon Jr.

Glandons, the same "was deposited in the bank then and there conducted

and that by the connivance and co-operation of Hasel and the two

27, 1924, claimant had as her estate the sum of \$8,372 in money,

E. W. Forrester, claimant's next friend, alleging that in December

of A. B. Glandon Jr. Accompanying the claim is a statement of

claim in this case was filed in the county court against the estate

solvent. A. B. Glandon Jr. has been adjudged a bankrupt. The

The Glandon State Bank and the estate of A. B. Glandon Jr. are in-

was appointed receiver of the Glandon State Bank on June 18, 1927.

Glandon Jr. died May 11, 1927, and the Illinois State Savings Bank

On May 8, 1927, the Glandon State Bank was closed. A.D.

Glandon Jr., Agent, Glandon State Bank.

on said bank as enumerated in the said report", and signed, "A. B.

that "the balance on hand is represented by certificates of deposit

Glandon State Bank. Attached to the report is a certificate resting

listing the certificates of deposit as having been issued by the

in the day the new bond was given, Hasel filed a report as mentioned,

issued on the money, and that the certificates were so given.

A. B. Glandon Jr. he would be entitled to account for that year and

Hasel on a former hearing to be used in the circuit court was entered into subject to an objection that the guardian was incompetent to testify. Whether or not he was incompetent and whether or not appellee waived such incompetency, if any, by cross examination, is unimportant. His testimony failed to prove that the claim is of the 5th class. There is nothing from which it can reasonably be inferred that A. B. Claudon Jr. ever had custody, possession, or control of the funds of the ward. On the contrary, Hasel's testimony is to the effect that the money of his ward was deposited in a usual way in the private bank of A. B. Claudon Sr. and later in the Claudon State Bank. His report, as guardian, shows that the funds were on deposit in the Claudon State Bank, and the report is supplemented by the certificate of A. B. Claudon Jr., an officer of that bank, to the same effect. Hasel's testimony further shows that there was no agreement requiring him to leave the funds in the Claudon State Bank or restricting his right to withdraw them at any time after maturity. He filed a claim with the receiver of the Claudon State Bank based upon the deposits and that claim is pending before a special master for decision. Both his testimony and his conduct establish the fact that he deposited the fund with the bank and did not entrust it to the Claudons either of them as individuals. The stipulation recites that he had had his ward's funds deposited with the Claudon Bank of Fairbury.

There is nothing in the record to distinguish the deposits made by the guardian from the ordinary time-deposits in banks. The bank became the debtor and the guardian the creditor. The decedent did not become a trustee in the sense claimed by appellant.

It is just as much the duty of one filing a claim against the estate of a decedent to establish the class to which his claim belongs as it is to prove the indebtedness. Before appellant is entitled to have a judgment rendered as of the fifth class, it is incumbent upon her to establish her right to such a judgment by a preponderance of the evidence. This she has failed to do. A. B. Claudon's liability was as surety on Hasel's bond as guardian and not as a trustee. The claim was properly allowed as of the 6th class.

The judgment of the circuit court is affirmed.

Affirmed

...on a former hearing to be used in the circuit court was
...into subject to an objection that the guardian was incomp-
...to testify. Whether or not he was incompetent and whether
...and appellee waived such incompetency, if any, by cross examination,
...important. His testimony failed to prove that the claim is of
...class. There is nothing from which it can reasonably be
...inferred that A. H. Glendon Jr. ever had custody, possession, or
control of the funds of the ward. On the contrary, Hessel's testimony
is to the effect that the money of his ward was deposited in a bank
way in the private bank of A. H. Glendon Sr. and later in the Glendon
State Bank. His report, as guardian, shows that the funds were on
deposit in the Glendon State Bank, and the report is corroborated by
the certificate of A. H. Glendon Jr., an officer of that bank, to
the effect that the funds were deposited in the Glendon State
Bank or testifying his right to withdraw them at any time after
naturalty. He filed a claim with the receiver of the Glendon State
Bank based upon the deposits and that claim is pending before a
special master for decision. Both his testimony and his conduct
establish the fact that he deposited the fund with the bank and
did not entrust it to the Glendons either of them as individuals.
The stipulation recites that he had had his ward's funds deposited
with the Glendon State Bank.
That it is settled in the courts of this jurisdiction that de-
posits made by the guardian from the ordinary time-deposits in banks.
The bank became the debtor and the guardian the creditor. The de-
cedent did not become a trustee in the sense claimed by appellants.
It is just as when the duty of one filing a claim against
the estate of a decedent to establish the class to which his claim
belongs as it is to prove the indebtedness. Before appellants be-
came entitled to have a judgment rendered in their favor, it is
incumbent upon her to establish her right to such a judgment by a
preponderance of the evidence. This she has failed to do. A. H.
Glendon's liability was as surety on Hessel's bond as guardian and
not as a trustee. The claim was properly allowed as of the 6th class.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 11, 1930 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:



Paul R. Goddard,

appellee,

Appeal from the Circuit Court
of Peoria County.

vs.

James W. Parker,

appellant,

Jones, J:

A suit in assumpsit was instituted by Paul R. Goddard against James W. Parker to recover upon a contract of guaranty executed in connection with the purchase and sale of newspaper. Goddard was the owner of the "Illinois Valley Herald" and had agreed to sell it to L. E. Neal for \$10,000.00. One-half of the purchase price was to be paid in stock of a publishing company to be organized and the other one-half was to be paid in cash within 90 days. The guaranty contract was given to secure this cash payment and purports to have been signed by nine men, whose liability was limited to \$500.00 each, with the exception that Parker's liability was limited to \$1,000.00.

The contract recites that in consideration of the agreement to transfer the subscription list, good will, etc., of the Illinois Valley Herald, as per the offer to sell the same to one L. E. Neal, the signers "do hereby agree that we will guarantee to you (Goddard) the payment of the sum set opposite our names below, to secure to you the payment of the cash consideration for the said sale, and that if said purchase price shall not be paid by said L. E. Neal, in accordance with your offer and his acceptance of the same, then we will pay to you the said sum in the proportions that we have obligated ourselves below. It is understood by the subscribers hereto that the same shall be void and without any force or effect unless the full sum of Five Thousand Dollars (\$5,000) shall be guaranteed by the signers hereof." Parker's signature is third from the last. Below his signature the names of L. A. Barker and H. S. Sheehan appear.

Appeal from the Circuit Court
of Peoria County.

appellee,

vs.

James W. Parker,

appellant.

James W. Parker,

A writ in assumpsit was instituted by Paul R. Goddard

against James W. Parker to recover upon a contract of guaranty

executed in connection with the purchase and sale of newspaper.

Goddard was the owner of the "Illinois Valley Herald" and had

agreed to sell it to L. E. Neal for \$10,000.00. One-half of the

purchase price was to be paid in stock of a publishing company

to be organized and the other one-half was to be paid in cash

within 90 days. The guaranty contract was given to secure this

cash payment and purports to have been signed by nine men, whose

liability was limited to \$500.00 each, with the exception that

Parker's liability was limited to \$1,000.00.

The contract recites that in consideration of the

agreement to transfer the subscription list, Good will, etc., of

the Illinois Valley Herald, as per the offer to sell the same to

one L. E. Neal, the signers "do hereby agree that we will guarantee

to you (Goddard) the payment of the sum set opposite our names

below, to secure to you the payment of the cash consideration

for the said sale, and that if said purchase price shall not

be paid by said L. E. Neal, in accordance with your offer and his

acceptance of the same, then we will pay to you the said sum in

the proportion that we have obligated ourselves below. It is

understood by the subscribers hereto that the same shall be

void and without any force or effect unless the full sum of five

thousand dollars (\$5,000) shall be guaranteed by the signers

hereto. Parker's signature is third from the last. Below

The declaration averred non-payment by Neal, and set up the contract of guaranty and also the breach. Parker filed a plea of the general issue and also a special plea. The latter plea denied that the purported signature of Sheehan was his genuine signature and averred that it had not been affixed with his knowledge or consent. It also averred that the contract had been materially altered since he signed it by the addition of the names of Barker and Sheehan.

The cause was tried by the court without a jury and judgment was rendered in favor of Goddard for \$1,101.56 and costs. When defendant signed the contract, it was taken from his office by Neal and L. A. Barker, and thereafter Neal delivered it to plaintiff. At the time plaintiff received the contract, he turned over the property and a bill of sale therefor, to Neal. No change appears to have been made in the instrument after its delivery. By whom Sheehan's name was signed does not appear in the testimony. He testified that he did not sign the guaranty or authorize anyone else to sign for him. There is no testimony in the record which tends to show that plaintiff had any knowledge the signature of Sheehan was not genuine. The record shows he received the instrument in good faith and delivered the property on the strength of it.

The law requires a guarantee to act in good faith, but unless he has knowledge of or participates in a deception practiced by the principal upon the guarantor, he is not responsible for the deception. (28 C. J. Guaranty 927; 12 R.C.L. Guaranty, Sec.26). Where there is no fraud on the part of the guarantee, his rights cannot be affected by any fraud practiced between the makers of the guaranty. When the guarantee commits, procures, or has knowledge of the fraud before he receives the instrument, it is otherwise. To affect his rights, he must have participated in or have had knowledge of the wrongful conduct, and where he is free from all fraud or participation in procuring the execution of the instrument, he cannot be held responsible for the wrong inflicted.

The declaration averred non-payment by Neal, and set

out the contents of Guaranty and also the breach. Parker filed

a copy of the General issue and also a special plea. The latter

plea denied that the purported signature of Sheehan was his

own signature and averred that it had not been affixed with

his knowledge or consent. It also averred that the contract had

been actually affixed since he signed it by the initials of the

names of Barker and Sheehan.

The cause was tried by the court without a jury and

judgment was rendered in favor of Goddard for \$1,101.85 and

costs. When defendant signed the contract, it was taken from

an office by Neal and J. A. Barker, and thereafter Neal delivered it

to plaintiff. At the time plaintiff received the contract, he

turned over the property and a bill of sale therefor, to Neal.

No change appears to have been made in the instrument after its

delivery. By whom Sheehan's name was signed does not appear

in the testimony. He testified that he did not sign the

contract or authorize anyone else to do so for him.

Testimony in the record which tends to show that plaintiff had

no knowledge the signature of Sheehan was not genuine. The

record shows he received the instrument in good faith and delivered

the property on the strength of it.

The law requires a guarantee to act in good faith, but

where he has knowledge of or participates in a deception practiced

by the principal upon the guarantor, he is not responsible for

the deception. (28 C. J. Guaranty 227; 12 R.O.L. Guaranty, Sec. 22.)

Where there is no fraud on the part of the guarantor, his rights

cannot be affected by any fraud practiced between the makers of the

instrument. When the guarantor commits, procures, or has knowledge

of the fraud before he receives the instrument, it is otherwise.

To attack his rights, he must have participated in or have had

(Easter v. Minard, 26 Ill. 495; Young v. Ward, 21 id. 323; Anderson v. Warne, 71 id. 20.) Whatever fraud and deception the co-makers of the instrument practiced toward one another was their own sale concern, and the consequence, so far as may affect them in their relation to each other, should be borne by them alone. There is no justice in requiring a guarantee to assume the risk of such conduct, and no sound principle upon which he should be made to suffer loss because of it, not being privy thereto. (Stoner v. Millikin, 85 Ill. 218).

It is insisted that the contract sued upon and offered in evidence is not the contract which defendant signed, in that the names of Barker and Sheehan did not appear thereon at the time defendant signed it. This contention is without merit. The contract itself discloses that it was to be signed by enough persons to make up a guaranty of \$5,000, and defendant had knowledge from the face of the instrument that others were to sign it.

Whether or not a recovery under the common counts can be had upon a guaranty is immaterial in this cause. The special count stated a good cause of action. Neither was it necessary to offer in evidence the sale agreement mentioned in the guaranty. The guaranty was offered in evidence. It is the agreement upon which the suit was brought, and the testimony is to the effect that the sale agreement was executed by the delivery of the property described in the guaranty, together with the bill of sale therefor.

The issues were confined to those embraced in defendant's affidavit of merits. The affidavit did not deny that the amount of defendant's subscription was due and unpaid when this suit was instituted and he cannot now raise that question. (Hunziker v. Mulcahey, 215 Ill. App. 508). It was not error to allow interest on the debt after maturity. (Dick Company v. Sherwood Letter File Co., 157 Ill. 325).

Young v. Ward, 115 Ill. 233; Anderson

Whichever friend and description the co-defendant

of the instrument practiced toward one another was their own

the consequence, so far as may affect them in

relation to each other, should be borne by them alone.

There is no justice in requiring a guarantee to assume the risk

of any conduct, and no sound principle upon which he should be

made to suffer loss because of it, not being privy thereto.

Young v. Millikin, 85 Ill. 318.

It is insisted that the contract was upon and related

in evidence is not the contract which defendant signed, in that

the names of Barker and Sheehan did not appear thereon at the

time defendant signed it. This contention is without merit.

The contract itself discloses that it was to be signed by

several persons to make up a guaranty of \$5,000, and defendant

obtained knowledge from the face of the instrument that others were

to sign it.

Whether or not a recovery under the common count can

be had upon a guaranty is immaterial in this case. The special

verdict stated a good cause of action. Whether was it necessary

to offer in evidence the sale agreement mentioned in the guaranty.

A guaranty was offered in evidence. It is the agreement upon

which the suit was brought, and the testimony is to the effect

that the sale agreement was executed by the delivery of the

guaranty described in the guaranty, together with the bill of

sale therefor.

The issues were confined to those embraced in defendant's

affidavit of merits. The affidavit did not deny that the amount

of defendant's subscription was due and unpaid when this suit was

instituted and he cannot now raise that question. (Hanniker v.

Chicago, 111 Ill. App. 803). It was not error to allow interest

on the sum due. (Chicago v. Standard Lumber, 115 Ill.

233, 234 Ill. 233.)

The contract sued upon does not state that it is understood and agreed between the guarantors and the guaranteed that the contract shall be void and of no effect if not signed by enough persons to make up the guaranty of \$5,000, but "it is agreed by the subscribers" that it should be void unless the full amount was subscribed. Obviously the arrangement was one among the subscribers for their own benefit. On the face of the instrument the full amount appeared to be subscribed.

Under the authorities above cited, the guarantee having acted in good faith, without fraud or knowledge of the alleged forgery, and so far as disclosed by the record, without notice of any fact which should have put him upon inquiry, the forgery of one of the signatures would not operate as a release of the other signers.

The court correctly refused the propositions of law tendered by defendant embracing his theory of the case.

The judgment is affirmed.

Judgment affirmed.

The contract was made before the date of the

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: On

1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

L. S. Mayer, doing business as
The Cannon Oiler Company,
Appellee,

vs.

Erle E. Gluba,

Appellant :

Appeal from the
Circuit Court of
Mercer County.

Jones J:

Plaintiff, L. S. Mayer, recovered a judgment for \$25.00 before a justice of the peace against defendant Erle E. Gluba. On Appeal to the circuit court, judgment was there rendered on a verdict in favor of plaintiff for \$25.00. The cause is now before this court on appeal.

The Cannon Oiler Company is a trade name adopted by Mayer, who has been engaged in the manufacture of various sheet metal articles at Keithsburg, Illinois, for several years. In December, 1926, a fire partially destroyed the building in which he carried on his business, as well as a quantity of material which he had on hand for manufacturing purposes. After the fire there was talk of Mayer's leaving Keithsburg, and in February or March, 1927, a meeting of business men was held relative to the rebuilding and retaining of his plant there. A committee was appointed to take the matter up with Mayer. As a result of conferences between the committee and Mayer, he wrote them a letter on April 13th, 1927, stating that if some arrangement could be made whereby he should be assured of receiving \$275.00 on October 1st of that year, and a like amount on the first day of April and October of each year up to April, 1937, he would commence the rebuilding of his plant at once "in conformance with the testative plan" of having a two-story building across the frontage of Washington Street, 20 ft. wide, balance to be one-story construction with steel over wood sheathing. The letter further stated, "The object of the payment of \$275.00 each six months, being to insure a going concern--I am agreeable to the suggestion made that it be paid to me only so long as the concern is a going

Appeal from the
Circuit Court of
St. Louis

: L. S. Mayer, doing business as
: The Cannon Oil Company,
: Appellee,
: vs.
: The W. Gluba,
: Appellant

Case 1:

Plaintiff, L. S. Mayer, recovered a judgment for
\$100 before a Justice of the Peace against Defendant The W.
Gluba. On appeal to the circuit court, judgment was there
reversed on a verdict in favor of Plaintiff for \$25.00. The
case is now before this court on appeal.

The Cannon Oil Company is a trade name adopted
by Mayer, who has been engaged in the manufacture of various sheet
metal articles at Keithsburg, Illinois, for several years. In
December, 1928, a fire partially destroyed the building in which
he carried on his business, as well as a quantity of material which
he had on hand for manufacturing purposes. After the fire there
was talk of Mayer's leaving Keithsburg, and in February or March,
1929, a meeting of business men was held relative to the rebuilding
and retaining of his plant there. A committee was appointed to
take the matter up with Mayer. As a result of conferences between
the committee and Mayer, he wrote them a letter on April 18th,
1929, stating that if some arrangement could be made whereby he
could be assured of receiving \$275.00 on October 1st of that
year, and a like amount on the first day of April and October of
each year up to April, 1937, he would commence the rebuilding of
his plant at once "in conformance with the tentative plan" of
building a two-story building across the frontage of Washington
street, 20 ft. wide, balance to be one-story construction with
steel over wood sheathing. The letter further stated, "The
payment of the payment of \$275.00 each six months, being \$137.50
in a going concern--I am agreeable to the suggestion made
that it be paid to me only so long as the concern is a going

concern in Keithsburg, and operating at least 9 months in the calendar year. Of course should business conditions, or conditions beyond my control, such as fire, storm damages, or strikes effect the business, I would expect your committee to continue its payments--as my interest will continue just the same. * * * If the plan is consummated, please make this letter a part of the contract,"

A subscription contract, to which the letter was attached and referred to, was executed by defendant and others, by which they each agreed to pay \$25.00 annually to a trustee to be afterward named by the subscribers. The only proviso to the subscription contract was that it should become null and void if the contract with Mayer became null and void.

Defendant insists that the court erred in excluding testimony relative to alleged conversations with and statements made by plaintiff previous to the execution of the subscription contract; in excluding testimony as to the number of people employed in the factory of plaintiff before the fire and before the execution of the contract, and testimony with reference to the cost of reconstructing the factory building. It is impracticable to review the details of the offered testimony, but such testimony was offered in an effort to vary the terms of the written contract, principally by showing that plaintiff had told defendant that "operating at least 9 months in the calendar year" meant that the business would be carried on in the same way and manner and to the same extent as before the fire. Testimony was offered to show that plaintiff had represented that the rebuilding of the factory would cost \$10,000 and that he desired to raise money to pay the interest on a loan for that amount, but that in fact the rebuilding of the factory had cost only \$2800.

If a contract is ambiguous and uncertain, it is open to extrinsic aid in the matter of its construction. The language of the contract in the case at bar is plain and unequivocal. Such a contract when reduced to writing cannot be

It is the plan is communicated, please make this letter a part of
 my payments--as my interest will continue just the same. * * *

and void all the contract with Meyer become null and void. If the subscription account was not in default before the 1st day of January 1900, the subscribers named by the subscribers. The only proviso is that they each agreed to pay \$25.00 annually to a trustee appointed and referred to, was executed by defendant and others, A subscription account, to which the latter are

Delaware. In fact, the court found that the testimony relative to the operation of the factory was not reliable, and that the testimony relative to the operation of the factory was not reliable, and that the testimony relative to the operation of the factory was not reliable.

If a contract is ambiguous and uncertain, it is void. The court said in the matter of the construction. The language of the contract in the case at bar is plain and un-

added to or varied by parol or extrinsic evidence. While it is a general rule that in construing a contract it is proper for the court to take into consideration the surrounding circumstances, this does not give to either party the right to establish by oral evidence a different contract from that expressed in the written agreement. Where parties have deliberately put their contract into writing, the rule is that the writing is the exclusive evidence of what the contract is. (*Memory v. v. Niepert*, 131 Ill. 623; *United Roumanian M. M. & G. Store v. Abramson*, 218 Ill. App. 577.) The trial court did not err in refusing to admit the offered testimony.

Defendant urges that plaintiff did not rebuild the one-story part of his factory by putting steel over wood sheathing. The testimony on this point is somewhat in conflict, but its weight shows that at least a portion of the one-story part was so covered. Defendant has not suggested any way in which he or any of the other subscribers has been damaged by the alleged failure of plaintiff to comply strictly with the terms of the contract in this respect, and there is no contention that the building is not sufficient or suitable for the needs of plaintiff's business. The testimony shows that the building was constructed in substantial compliance with the contract. The deviation, if any, is inconsequential, and not sufficient to defeat a recovery by plaintiff.

Defendant complains of an instruction given on behalf of plaintiff, in which the jury are told that if the evidence bearing upon plaintiff's case preponderates in his favor, although but slightly, it will be sufficient for the jury to find the issues in his favor. This instruction has been repeatedly condemned, but has not been held to be reversible error. (*Riddle v. Mansager*, 254 Ill. App. 68.) In *Malloy v. Chicago Rapid Transit Co.*, 335 Ill. 164, and in *Bunch v. Abbott*, 256 Ill. App. 33, judgments were reversed where the expression complained of was used in an instruction, but in each of those cases other errors prejudicial to the appellant therein also occurred, and no cause has been reversed where the only error committed was

which is as well as any other evidence. While it is a general rule that in construing a contract it is to be construed according to the intention of the parties, and the court to take into consideration the surrounding circumstances, this does not mean to allow the jury to disregard the evidence of oral evidence or written evidence. The court is to be guided by the written agreement. There is no evidence in this case that the contract was not written, the rule is that the writing is the best evidence of what the contract is. (Lambert v. W. H. Hays, 121 Ill. 683; United Northwestern M. & G. Store v. Johnson, 218 Ill. App. 577.) The trial court did not err in refusing to admit the offered testimony.

Defendant urges that plaintiff did not repudiate the contract by putting steel over wood sheathing. The testimony on this point is somewhat in conflict, but the weight shows that at least a portion of the one-story part was removed. Defendant has not suggested any way in which he or any of the other subscribers has been damaged by the alleged failure of plaintiff to comply strictly with the terms of the contract in this respect, and there is no contention that the building is not sufficient or suitable for the needs of plaintiff's business. The testimony shows that the building was constructed in substantial compliance with the contract. The deviation, if any, is immaterial, and not sufficient to defeat a recovery by plaintiff.

Defendant complains of an instruction given to the jury.

In plaintiff's favor, in which the jury was told that in the evidence showing upon plaintiff's case preponderates in his favor, although not slightly, it will be sufficient for the jury to find the issues in his favor. This instruction has been repeatedly

given, but one has been held to be reversible error. (Lambert v. Hays, 121 Ill. 683; In Hays v. Chicago Rapid Transit Co., 255 Ill. 184, and in Hays v. Abbott, 258 Ill. App.

It is not necessary to state the substance of the instruction given to the jury in each of those cases other than to the appellant therein also occurred, and no error has been reversed where the only error committed was

the giving of such an instruction. We observe no error in the refusal of defendant's offered instruction defining a "going concern" as meaning that the concern should continue to transact its ordinary business. An instruction was given on behalf of plaintiff which defined the phrase as a term applied to a concern or an individual which is still prosecuting his or its business with the prospect of expectation of continuing to do business. (28 C. J. 712.) Complaint is also made of the refusal to give other instructions tendered by defendant, but the subject matter thereof was covered by other given instructions and there was no error in the refusal. Finding no substantial error in the record, the judgment of the trial court is affirmed.

Judgment affirmed.

the giving of such an instruction. We observe no error in
the refusal of defendant's offered instruction because "going
forward," as meaning that the concern should continue to transact
its ordinary business. An instruction was given on behalf of
plaintiff which defined the issue as a fact whether it is a contract
or an obligation which is still prosecuting his or its business
with the purpose of perpetuating its obligation to its business.
(See U. S. 112.) Plaintiff is also one of the refusal to give
other instructions tendered by defendant, but the subject matter
thereof was covered by other given instructions and there was no error
in the refusal. Finding no substantial error in the record, the
judgment of the trial court is affirmed.
Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:
Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: On
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

PARKER TRUCK COMPANY, A
CORPORATION,

Appellee,

vs.

ESTATE OF JACOBUS KOEK,
DECEASED,

Appellant,

Appeal from the
Circuit Court of
Lake County.

JONES J:

A claim was filed in the Probate Court of Lake County by The Parker Truck Company against the estate of Jacobus Koek, deceased, on a series of notes given by the decedent in payment of an automobile truck purchased by him from appellee. The estate claimed the right to recoup damages alleged to have been sustained by reason of a secret defect in the braking system of the truck. The claim was allowed in the probate court in the sum of \$1,984.93. An appeal was taken to the circuit court, where a trial was had before a jury and at the close of the evidence the court directed a verdict in favor of appellee and against said estate in the sum of \$2,069.37. This appeal is prosecuted from a judgment on the verdict.

It was not error to admit the notes in evidence without proof of execution and delivery as there was no affidavit on file denying their execution. (*Declurque v. Campbell*, 231 Ill. 442; *Campbell v. Thompson*, 192 Ill. App. 415.)

Koek, while driving his truck on April 24, 1928, was struck by a train on the Chicago, Milwaukee & St. Paul Railroad. He was killed and his truck demolished. Plaintiff claims that the accident was caused by a manufacturer's defect in the bolts holding the torsion rods to the chassis; that the breaking of such bolts released the brakes and allowed the truck to coast down a 6% grade on a highway in front of the approaching train; that such bolts were broken by a quick, vigorous application of the brakes, applied to the loaded truck while it was going

Appeal from the
Circuit Court of
Lake County

IN SENATE
JANUARY 10, 1933
REPORT OF THE
COMMISSIONER OF
THE LAND OFFICE
TO THE SENATE
IN RESPONSE TO
A RESOLUTION
PASSED MAY 1, 1932
RELATIVE TO THE
LANDS BELONGING
TO THE STATE OF
ILLINOIS

Page 11

A claim was filed in the Probate Court of Lake County
by The Parker Truck Company against the estate of Jacobus Koek,
deceased, on a series of notes given by the deceased in payment
of an automobile truck purchased by him from appellee. The
decedent claimed that there was a defect in the braking system of
the truck. The claim was allowed in the probate court in the
sum of \$1,000.00. An appeal was taken to the circuit court,
where a trial was had before a jury and at the close of the
evidence the court directed a verdict in favor of appellee
and against said estate in the sum of \$2,000.00. This judgment
is presented from a judgment on the verdict.
It was not error to admit the notes in evidence without
proof of execution and delivery as there was no objection on
this during their execution. (DeCoudre v. Campbell, 231 Ill.
441; Campbell v. Thompson, 198 Ill. 410.)
Koek, while driving his truck on April 24, 1932, was
struck by a train on the Chicago, Milwaukee & St. Paul Railroad.
He was killed and his truck demolished. Plaintiff claims that
the accident was caused by a manufacturer's defect in the bolts
holding the tension rods to the chassis; that the breaking of
such bolts released the brakes and allowed the truck to coast
down a hill onto a highway in front of the approaching train;
that such bolts were broken by a quick, vigorous application
of the brakes, applied to the loaded truck while it was going

down the grade approaching the railroad track; and that the brakes held until the truck was about 40 feet north of the railroad tracks, when they ceased to function.

The question arises whether there is any evidence in the record which, if taken as true with all reasonable inferences to be drawn therefrom, would fairly tend to support appellant's defense of recoupment. If there is, it was error to direct a verdict. The only eye witness to the accident was the fireman on the locomotive of the train which struck decedent's truck. The fireman testified that when he first saw the truck it was approaching the railroad crossing and was then about 200 feet away from it; that he watched decedent continuously from that time until the collision, and was looking out just as the train hit him; that he could see the form of decedent in the cab of the truck; but was unable to say whether or not decedent looked toward the approaching train, and could not see whether or not he was working the levers to set the brakes. He testified that the truck was travelling about 12 to 13 miles per hour until it reached a point about 100 feet north of the railroad track; that it then began to slow up and almost came to a stop at a point about 40 feet north of the crossing; that the truck was loaded with crushed stone and did not deviate from the travelled roadway. The testimony tends to show that at the coroner's inquest held shortly after the accident, the witness testified that decedent's truck did not slow down as it approached the railroad crossing.

A witness for appellant was permitted to testify that the decedent was a very careful driver. Proof of a decedent's habit of care is admissible when there is no eye witness to a fatal accident. (Humison v. M. C. R. R. Co., 259 Ill. 462; Collision v. I.C. R.R. Co., 239 id. 532; Morgan v. R.B. & J. R. Co., 251 Ill. App. 127.) Where there is an eye witness to the accident such proof is improper. (Morgan v. R.B. & J. R. Co., supra.) The fireman on the locomotive was an eye witness to the accident, even though he did not observe whether or not

...the grade approaching the railroad track; and that the
...the track was about 4 feet north of the rail-
...then they moved to location.

[illegible]

A witness for appellant was permitted to testify that appellant was a very careful driver. Proof of a defendant's ability to care is admissible when there is no witness to the accident. (Mason v. M. O. R. Co., 229 Ill. 428; Morrison v. I. C. R. Co., 229 Ill. 432; Morgan v. I. C. R. Co., 231 Ill. App. 127.) Where there is an eye witness to the accident such proof is improper. (Morgan v. I. C. R. Co., 231 Ill. App. 127.) The witness on the locomotive was an eye witness to the accident, even though he did not observe whether or not

the decedent was attempting to set the brakes on his truck. We know of no rule which permits evidence of careful habits, merely because an eye witness does not testify to all the details of the accident. Obviously such a rule would permit testimony as to such careful habits in any fatal accident case, for it is improbable that any witness, under the stress of the excitement, naturally induced by an impending disaster, could observe and remember all that happens. Even if testimony as to careful habits had been proper, it seems logical to conclude that if the decedent had seen the train and if his brakes failed, he would have made some effort to turn the truck aside, and would not have driven straight down the road directly into the path of the approaching train.

The record discloses that the truck was of two and one-half to three and one-half tons capacity, weighed about 8,000 pounds, and was of about 45 horse-power, with double wheels at the rear. The brakes operated only on the two rear wheels. Each torsion rod was anchored to the chassis by a bolt 11/16ths of an inch in diameter. After the accident it was found that the torsion rods and bolts were broken. The bolts were sheared off close up against the flange where the torsion rods were attached. Appellant produced as a witness an automobile mechanic of several years' experience, who testified to the condition of the wrecked truck, torsion rods, and bolts after the accident. He was asked his opinion as to whether or not the collision between the engine and the truck broke the bolts. An objection was properly sustained to the question. Testimony by expert witnesses is admissible only when the subject matter of inquiry is of such character that only persons of skill and experience in it are capable of forming a correct judgment about it. (Yarber v. C. & A. R.R. Co., 235 Ill. 589; Hoffman v. Tosetti Brewing Co., 237 id. 185.) The witness was also asked, if as an automobile mechanic, he had an opinion as to whether or not said bolts were ever at any time of sufficient size and dimension to withstand a strain such as would be placed upon it when the brakes would be set on the truck. He was also asked whether he had an opinion

The witness was attempting to get the brakes on his truck. We
know of no rule which permits evidence of careless habits, merely
because an eye witness does not testify to all the details of
the accident. It is a rule which permits evidence of careless
habits in any fatal accident case, for it
is impossible for any witness, under the stress of the excite-
ment, to be fully informed by an impending disaster, could observe
and remember all that happens. Even if testimony as to careless-
ness had been proper, it seems foolish to conclude that if the
witness had seen the train and if his brakes failed, he would
have made some effort to turn the truck aside, and would not
have driven straight down the road directly into the path of
the approaching train.

The record discloses that the truck was of two and one-
half to three and one-half tons capacity, weighed about 8,000
pounds, and was of about 45 horse-power, with double wheels
on the rear. The witness happened only on the day of the
accident and was not involved in the accident as a party to it.
It is true in this case, that the witness is not a party to the
accident and his testimony is not binding. The witness was observed at
close up against the place where the broken rods were attached.
The witness produced as a witness an automobile accident of several
years ago, and testified as to the condition of the witness
before, during and after the accident. He was asked
his opinion as to whether or not the collision between the train
and the truck was the cause of the accident. A question was propo-
sed to the question. Testimony by expert witnesses is ad-
mitted only when the subject matter of inquiry is of such
character that only persons of skill and experience in it are
capable of forming a correct judgment about it. (Yarber v. U.
S. R.R. Co., 233 Ill. 509; Hoffman v. Tinselt Brewing Co.,
202 Ill. 185.) The witness was also asked, if as an automobile
witness, he had an opinion as to whether or not said bolts were
of sufficient size and dimension to withstand a
strain such as would be placed upon it when the brakes would be
set on the truck. He was also asked whether he had an opinion

as to the size of the bolt that should be used for the purpose of withstanding the strain of setting the brakes on that truck. The court sustained objections to the questions. Thereupon, cumulative testimony of the same kind was offered by appellant and like objections sustained.

There is no proof in the record which even tends to show that there was any sudden setting of the brakes on the truck. On the contrary, the testimony of the fireman, who was the only eye witness, wholly negatives that contention. There is no showing that decedent saw the train and the testimony is insufficient to fairly establish that he set the brakes on his truck at all. The testimony shows that the truck was badly wrecked by the accident, but there is no proof in the record as to whether the bolts were broken before the collision with the locomotive or by the collision or what in fact broke them. Until there was some competent evidence tending to show that the breaking of the bolts caused the accident, there was no basis for the proffered testimony as to their alleged insufficiency, and the objections were properly sustained.

Appellant's evidence, with all reasonable inferences to be drawn therefrom, did not fairly tend to establish the defense of recoupment. Under such circumstances, it was the duty of the trial court to direct the jury to return a verdict for appellee. (Allen v. U. S. Fidelity Co., 269 Ill. 234; Libby, McNeill & Libby v. Cook, 222 id. 206; Devine v. Delano, 272 id. 179; Kelly v. Chicago City Ry. Co., 283 id. 643; McFarlane v. Chicago City Ry. Co., 288 id. 478.)

The judgment is affirmed.

Judgement affirmed.

The following will tell how to do things better than I did. To make all of us

$$0.2 \times 10^{-3} \text{ mol dm}^{-3} \quad 0.2 \times 10^{-3} \text{ mol dm}^{-3} \quad 0.2 \times 10^{-3} \text{ mol dm}^{-3} \quad 0.2 \times 10^{-3} \text{ mol dm}^{-3} \quad 0.2 \times 10^{-3} \text{ mol dm}^{-3} \quad 0.2 \times 10^{-3} \text{ mol dm}^{-3}$$

Thereupon, requested. and the question to the question.

One challenge of portable new book cases and to your local system.

Abstracts of the following papers were presented:

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

Other local groups are working to reduce the number of cars on the road.

At the meeting, the President of the Union, Mr. J. H. ...

... ..

... saw the train and the testimony is insufficient to

The

... shows that the truck was badly wrecked by the accident.

There is no proof in the record as to whether the bolts were

before the collision or by the collision.

tion or what in fact broke them. Until there was some consistent

2. *Journal of the American Medical Association*, 1954; 157: 1001-1002.

Appellant's evidence, with all reasonable inferences

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

of recognition. Under such circumstances, it was the duty

we're always a number of years left tooth at once that is

[illegible]

of 372, 401, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

[illegible]

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• Verify the Assumptions

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

257 I.A. 658⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 11 1930 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

William J. Reineke,

appellee,

vs.

Appeal from the Circuit Court
of Winnebago County.

Max Benthien,

appellant,

JONES, J:

This is an appeal by Max Benthien, appellant, from an order denying his motion to open up a judgment by confession and for leave to plead. The judgment by the court against him in favor of appellee was entered in term time on one of the regular days of court. His affidavit in support of the motion states that the note entered in judgment is not the property of plaintiff; that the affidavit on the back of the narr as to the amount due is false; that Reineke is not the owner of the note and affiant does not owe Reineke any money; that the amount of the judgment is excessive; that the note provides for the payment of reasonable attorney's fees; that the judgment includes the sum of \$76.27 as attorney's fees which is unreasonable and excessive; that the amount of attorney's fees under the provisions of the note should have been fixed by the court upon evidence; that the court did not fix the attorney's fees, but that they were fixed by the attorney for the plaintiff; that plaintiff was not a holder in due course; that the assignment of the note was made after maturity thereof; ~~xxx~~ and that defendant is entitled to a set off of \$100 or more for returned automobile premiums and damage claims, which plaintiff promised to pay defendant and has never paid.

An affidavit in support of a motion to set aside a judgment by confession must state facts which make out a meritorious defense and not merely facts from which it is possible to infer such a defense. (Dermann v. Conley, 135 Ill. App. 504; Gilmore v. German Savings Bank, 89 id. 442; Chicago Fire Proofing Co. v.

Bank National Bank, 145 Ill. 481; Western Heater Manufacturing Co. v. Chandler, 211 Ill. App. 513). It should set forth facts and not conclusions. (DeWitt v. Flint & Selling Mfg. Co., 172 Ill. App. 356; Blanks v. Mills, 205 id. 542). The affidavit in this case discloses no facts which would constitute a defense to the note on the merits. It charges that the plaintiff is not a holder in due course, but it is not claimed that there is any infirmity or defect in the instrument. It is merely asserted that he is not the owner, but no fact is set forth as a basis for such conclusion. It is not denied that he is the holder of the note. A holder, whether in due course or not, has a right to sue on a note. (Sec. 51, Art. IV, Negotiable Instrument Law). A judgment by confession will not be opened up for the purpose of permitting a plea of set off or cross action. (State Bank of Mansfield v. Stauffer, 201 Ill. App. 132; Koehler v. Glaua, 169 id. 537; Smysor v. Hassock, 256 id. 29).

Appellant's principal contention is that the judgment entered included an attorney's fee fixed by the attorney for plaintiff and not by the court. The bill of exceptions contains the motion to open up the judgment and for leave to plead, the affidavit in support thereof, the order overruling the motion, exception, prayer for, and allowance of an appeal. The judgment having been entered in term time, it will be presumed that the court heard evidence on which to base the judgment. (State Bank of Clinton v. Barnett, 151 Ill. App. 79; Bowman v. Powell, 127 id. 114; Boyles v. Chytraus, 175 Ill. 570).

Upon an appeal from a judgment by confession entered in term time, the warrant of attorney, the affidavit furnishing proof of execution of the warrant of attorney, and the note upon which the judgment is confessed, together with a transcript of the evidence heard, if any, must be brought up by a bill of exceptions.

The bill of exceptions in the case at bar does not

state what evidence was heard at the time the judgment was confessed or that no evidence was heard at that time, or that it contains all of the evidence. It will therefore be presumed that evidence was heard and that the evidence was sufficient upon which to base the finding and judgment. (Boyles v. Chytraus, supra; Miller v. Glass, 118 Ill. 443).

While the note, warrant of attorney, and affidavit of execution have been copied into the record, they are no part thereof, but should have been incorporated in a bill of exceptions. (Boyles v. Chytraus, supra). Under the release of errors in both the warrant and the cognovit, the only matters to be considered on appeal are errors arising on the motion to open up the judgment and for leave to plead. All the objections urged by appellant were waived of record in the trial court. He cannot now assign as error that which he solemnly released of record. (Boyles v. Chytraus, supra).

It may be observed that the abstract filed by appellant is insufficient. Rule 16 of this court requires that the abstract must state in a concise form so much as may be necessary or important of the * * judgment or decree. The only reference to a judgment in the abstract are the words "confession of judgment". Where a party seeks to have a judgment reversed, the error must be made to appear by the abstract. (Welch v. Chicago, 323 Ill. 498).

The judgment of the trial court is affirmed.

Judgment affirmed.

...the evidence was heard at the time the judgment was rendered. It is not necessary that the evidence be heard at the time the judgment is rendered. It will therefore be assumed that the evidence was heard at the time the judgment was rendered.

...the evidence was heard at the time the judgment was rendered. It is not necessary that the evidence be heard at the time the judgment is rendered. It will therefore be assumed that the evidence was heard at the time the judgment was rendered.

It may be observed that the abstract filed by appellant is manifestly. Rule 16 of this court requires that the abstract must state in a concise form as much as may be necessary or important of the judgment or decree. The only reference to "error" in the abstract are the words "reversal or judgment". There is no need to have a judgment reversed, but which must be made to appear by the abstract. (Wells v. Chicago, 233 Ill.

...the evidence was heard at the time the judgment was rendered. It is not necessary that the evidence be heard at the time the judgment is rendered. It will therefore be assumed that the evidence was heard at the time the judgment was rendered.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

182 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in
the year of our Lord one thousand nine hundred and thirty,
within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2571.A. 658⁵

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 21 1930 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS,
Second District.

- - -
February Term, A.D., 1930.
- - -

| | | |
|---------------------------|---|---------------------------|
| ARMER E. JOHNSON, Trustee |) | |
| |) | |
| Appellant |) | |
| |) | Appeal from Circuit Court |
| -vs- |) | |
| |) | of Winnebago County. |
| FRANK G. HOGLAND, |) | |
| |) | |
| Appellee |) | |

- - -

OPINION by BOGGS, P. J.
- - -

On September 19, 1929, appellant filed a bill in the circuit court of Winnebago county against appellee, setting forth that on February 17, 1929, a certain trust agreement was entered into by appellee, certain banking institutions and individuals, creditors of appellee; that appellant was the trustee named in said instrument; that on September 8, 1929, appellant tendered his resignation to take effect on October 5, 1929.

Said bill further alleges that appellant had submitted statements covering his receipts and expenditures as such trustee from the inception of said trust to September 4, 1929; that appellee "has approved all of the disbursements and expenditures made by such trustee during such period of time, except compensation at the rate of \$100 per month paid and to be paid to Seidman & Seidman, certified public accountants, for services rendered to said trustee. That in the fifth paragraph of said trust agreement it is provided:

"The trustee shall be and he is hereby authorized to employ such attorneys, agents and other employees as may be deemed necessary by him in the administration of the trust, and in per-

In The

COURT OF APPEALS

Second District

January Term, A.D., 1930.

Appeal from Circuit Court
of Winnebago County.

THOMAS E. JOHNSON, Trustee

Appellant

-vs-

THOMAS C. KODIAK,

Appellee

FILED IN BOOK 1, P. 1

On September 12, 1929, appellant filed a bill in the circuit court of Winnebago county against appellee, setting forth that on February 17, 1929, a certain trust agreement was entered into by appellee, certain banking institutions and individuals, creditors of appellee; that appellant was the trustee named in said instrument; that on September 5, 1929, appellant tendered his resignation to take effect on October 5, 1929.

Said bill further alleges that appellee had submitted statements covering his receipts and expenditures as such trustee from the inception of said trust in September 4, 1929; that appellee approved all of the disbursements and expenditures made by said trustee during each period of time, except compensation at the rate of \$100 per month paid and to be paid to Selman & Selman, certified public accountants, for services rendered to said trustee. That in the fifth paragraph of said trust agreement it is provided:

"The trustee shall be and he is hereby authorized to employ such attorneys, agents and other employees as may be deemed necessary by him in the administration of the trust, and in per-

forming the duties enforced upon him in connection therewith, and to pay any and all expenses thereof including any and all court costs and other costs.' That the property covered by said trust has an estimated value of about \$3,661,787.26; that at the time of the commencement of the trust the indebtedness of said Frank G. Hogland was about \$785,331.84; that the purpose of said trust was that of securing the payment of the indebtedness of the said Frank G. Hogland in the manner provided in said trust agreement."

Said bill further alleges that the services of Seidman & Seidman were rendered through their representative, B. W. Flynn, and that the same were reasonable worth \$1,900, and prays for an order directing appellant to pay said amount to said firm.

An answer was filed by appellee, in which he admits the execution of said trust agreement, and that the resignation of appellant would become effective on October 5, 1929. He neither admits nor denies the allegations with reference to receipts and expenditures, but admits that a controversy has arisen with reference to the claim for services rendered by B. W. Flynn, the representative of Seidman & Seidman, and denies that they are entitled to be paid any sum whatever.

On the hearing, the court found that Seidman & Seidman had been paid for their services at the rate of \$100 per month to September 17, 1928, and were entitled to retain said amount, but were not entitled to compensation subsequent to September 17, 1928, and adjudged 7/19 of the costs against appellee and 12/19 thereof against appellant. To reverse said decree, this appeal is prosecuted.

Cross errors were assigned by appellee, charging: (1) That the court erred in allowing appellant as such trustee the credit of \$700 on account of payments to Seidman & Seidman. (2) In Adjudging any part of the costs against appellee.

It is conceded that the trust agreement warranted the employment of accountants. The employment of Seidman & Seidman was made with appellee's knowledge, and acquiescence. Flynn, as the

...enforced upon him in connection therewith,
...all expenses thereof including any and all
...other costs. That the property covered by said
...estimated value of about \$3,381.84; that at the
...of the commencement of the trust the indebtedness of said
...was about \$783.84; that the purpose of said
...that of securing the payment of the indebtedness of the
...in said trust is the same as in said trust...

...that all parties alleged that the amount of said
...payments were rendered through their representative, E. W. Flynn,
...and that the same were reasonable worth \$1,900, and payable for an
...after directing appellant to pay said amount to said firm.
...An answer was filed by appellee, in which he admits the
...of said trust agreement, and that the resignation of
...appellant would become effective on October 5, 1928. He neither
...denies the allegations with reference to receipts and
...to the claim for services rendered by E. W. Flynn, the
...of Flynn, and that the same were rendered for the
...to be paid any and whatever.

...of the trust, the money found that Flynn & Seidman
...been paid for their services at the rate of \$100 per month to
...1928, and were entitled to retain said amount, but
...and nothing in compensation agreement is to be paid to Flynn & Seidman
...of the costs against appellee and Flynn & Seidman.
...To reverse said decree, this appeal is presented.
...Cross errors were assigned by appellee, charging: (1)
...the court erred in allowing appellant as much trustee the credit
...of \$700 on account of payments to Flynn & Seidman. (2) In ad-
...making any part of the costs against appellee.

It is conceded that the trust agreement warranted the em-
...of Flynn & Seidman. The assignment of Flynn & Seidman was
...Flynn & Seidman's knowledge, and acquiescence. Flynn, as the

representative of Seidman & Seidman, at Rockford, from time to time rendered services to appellant in connection with said trust, with the knowledge and acquiescence of appellee. Some while after the execution of said trust agreement, the firm of Seidman & Seidman took employment from the National Lock Company, which company, with the Nelson Lock Company, filed bills in the circuit court against appellant. Flynn conferred with the attorneys representing said companies, and furnished them with information and data in the preparation of said bills. On the hearing Flynn, over the objections of appellant, in answer to the following questions, testified:

"Q. Now in the year 1928, did you do some work for the National Lock Co?

"A. Yes, sir.

"Q. Did you make a charge against the National Lock Co. for services of that kind?

"A. Yes, sir.

"Q. Did you confer with the attorneys in Chicago in respect to that data?

"A. Yes, sir.

"Q. Were you in Chicago when the lawyer was dictating the bill that was later filed?

"A. Yes, sir.

"Q. And did you assist in that?

"A. I furnished them some figures.

"Q. So that there was a time when you were acting in behalf of the National Lock Company and preparing figures to begin a suit against Mr. Hogland, and at the same time you were acting for his trustee?

"A. Yes, sir.

"Q. You continued after that time to represent both the National Lock Company, which was the complainant in the suit, and Arner Johnson, who was one of the defendants, did you?

"A. Well, I continued to do work for both of them."

He further testified that he made reports at different times, to the board of directors of the National Lock Company.

... of ... at ... from time to time ...
... to appellant in connection with said trust, with ...
... and acquiescence of appellee. Some while after the ...
... of said trust agreement, the firm of ...
... from the National Lock Company, which company ...
... National Lock Company, filed bills in the circuit court ...
... with the attorney representing ...
... and furnished them with information and data in the ...
... of said bills. On the hearing ... over the objections ...
... in answer to the ...
... in the year 1908, did you do some work for the National

... Yes, sir.
... did you make a change against the National Lock Co. for services ...
... Yes, sir.
... did you confer with the attorneys in Chicago in respect to what ...
... Yes, sir.
... were you in Chicago when the lawyer was dictating the bill ...

... was later filed?
... Yes, sir.
... And did you assist in that?
... I furnished them some figures.
... On that there was a time when you were acting in behalf of the ...
... National Lock Company and ...
... and at the same time you were acting for the ...
... Yes, sir.
... continued after that time to represent both the National ...
... which was the complainant in the suit, and ...
... who was one of the defendants, did you?
... Yes, I continued to do work for both of them.
... that he made reports at different times, to the ...
... of the National Lock Company.

Counsel for appellant practically concede that Flynn was furnishing information and data to the parties contemplating instituting suits against appellee, but insist that under the trust agreement, appellee's creditors were interested and that it was not a breach of trust for Flynn so to act. It is further contended that appellee is estopped to raise the question of the dual services of Flynn, for the reason that it is claimed appellee had knowledge thereof and did not object thereto.

Appellee specifically testified that he never consented to Flynn performing the services he did to the parties filing said bills. It is hard to believe that a man of the business affairs of appellee would consent to or acquiesce in a matter of that kind. The record discloses that the bill filed by the National Lock Company charged, among other things, certain alleged irregularities in the dealings between appellee and said company, including some alleged unauthorized loans to appellee, and alleged unauthorized profits on his part in dealing with the company, and that appellee had dominated the board of directors.

A trustee is not permitted to place himself in a position where it will be difficult for him to be honest and faithful to his trust. *Tyler v. Sanborn*, 128 Ill. 136-143; *Butler Paper Co. v. Robbins*, 151 Ill. 588-625; *Salbraith v. Tracy*, 153 Ill. 54-65; *Bennett v. Weber*, 323 Ill. 283-294.

While Seidman & Seidman and Flynn were not trustees, they were employed by the trustee, and had the most intimate knowledge with reference to the conditions and affairs of such trust. It is

Conceding the appellant's position, it is clear

was furnishing information and data to the parties concerning
investigation suits against appellee, but insist that under the
trust agreement, appellee's creditors were interested and that it
was not a breach of trust for Wynn to do so. It is further con-
ceded that appellee is estopped to raise the question of the dual
services of Wynn, for the reason that it is claimed appellee had
knowledge of Wynn's position at the time he was employed.

Appellee specifically admitted that he knew

Wynn was performing the services he did to the parties filing suits
there. It is hard to believe that a man of the business attain-
ment of appellee would consent to or acquiesce in a matter of that kind.
The record discloses that the bill filed by the National Loan
Company charges, among other things, certain alleged irregulari-
ties in the dealings between appellee and said company, includ-
ing some alleged unauthorized loans to appellee, and alleged
unauthorized profits on his part in dealing with the company,
and that appellee had dominated the board of directors.

A trustee is not permitted to place himself in a position
where it will be difficult for him to be honest and faithful to
his trust. *Tyler v. Sanborn*, 128 Ill. 133-143; *Miller Paper Co.
v. Robinson*, 161 Ill. 389-395; *Calbraith v. Tracy*, 128 Ill. 24-33;

While Seidman & Seidman and Wynn were not trustees,
they were employed by the trustees, and had the most intimate knowledge
of the conditions and affairs of each trust. It is

not out of place to say that the same rule which applied to the trustee should apply to them, so far as the issues here involved are concerned.

The record shows that appellant had actual knowledge that Flynn was furnishing information to the National Lock Company. He was asked this question:

"Q. Now, while you were trustee, while you were chairman of the board of directors of the National Lock Company, did you have or know of Mr. Flynn going through the records of the National Lock Company and furnishing information upon which suits were brought against Mr. Hogland?

"A. I was told he did some such work."

Counsel for appellant contend that, notwithstanding all that Flynn did in connection with said suits, appellee is estopped to raise that question as against the payment for services performed by Flynn, as he had knowledge that Flynn was in fact furnishing such information.

Without going into the question as to whether the record will warrant such conclusion, we hold that appellee would not be estopped thereby. In other words, the record fails to warrant the conclusion that appellee knew that such bills were to be billed against him.

The trial court found that appellant was entitled to credit for the \$700 paid. We are inclined to affirm that finding, on the ground that up to that time there had been no breach of trust. We also hold that the finding that no additional payments should be made should be affirmed. The findings of fact of the trial court should be allowed to stand unless we are able to say they are against the manifest weight of the evidence. This we are not prepared to do. Heiligenstein v. Schlotterbeck, 300 Ill. 206-211; Parker v. Riley, 317 Ill. 441-450; Fitch v. Teninga, 330 Ill. 140-171; Moore v. Moore, 325 Ill. 517-522. We find no reason for disturbing the ruling of the court with reference to the apportioning of the costs.

The the reasons above set forth, the decree of the trial court will be affirmed. Affirmed.

...and it is not to be taken as any more than a mere suggestion to the
...should apply to them, as they are not intended to be
...and the court.

The court found that appellant had not shown that
...information to the National Book Company. He

...and the court found that appellant had not shown that
...of the National Book Company, and you have an
...through the records of the National Book
...and the court found that appellant had not shown that

...I was told he did some work.
...for appellant content that, notwithstanding all
...in connection with said entry, appellee is estopped
...as against the record of the National Book
...as he had knowledge that Flynn was in fact furnishing
...information.

Without going into the question as to whether the record
...we hold that appellee would not be
...In other words, the record fails to warrant
...that such bills were to be
...against him.

The trial court found that appellant was entitled to
...for the \$400 paid. We are inclined to affirm that finding,
...to that time there had been no breach of
...We also hold that the finding that no additional payments
...The findings of fact of the
...be made should be affirmed. The findings of fact of the
...be made should be affirmed unless we are able to
...against the manifest weight of the evidence. This we
...Hollingsworth v. Hollingsworth, 200 Ill. 515, 71 Ill. App. 3d 111, 112-113, 114-115, 116-117, 118-119, 120-121, 122-123, 124-125, 126-127, 128-129, 130-131, 132-133, 134-135, 136-137, 138-139, 140-141, 142-143, 144-145, 146-147, 148-149, 150-151, 152-153, 154-155, 156-157, 158-159, 160-161, 162-163, 164-165, 166-167, 168-169, 170-171, 172-173, 174-175, 176-177, 178-179, 180-181, 182-183, 184-185, 186-187, 188-189, 190-191, 192-193, 194-195, 196-197, 198-199, 200-201, 202-203, 204-205, 206-207, 208-209, 210-211, 212-213, 214-215, 216-217, 218-219, 220-221, 222-223, 224-225, 226-227, 228-229, 230-231, 232-233, 234-235, 236-237, 238-239, 240-241, 242-243, 244-245, 246-247, 248-249, 250-251, 252-253, 254-255, 256-257, 258-259, 260-261, 262-263, 264-265, 266-267, 268-269, 270-271, 272-273, 274-275, 276-277, 278-279, 280-281, 282-283, 284-285, 286-287, 288-289, 290-291, 292-293, 294-295, 296-297, 298-299, 300-301, 302-303, 304-305, 306-307, 308-309, 310-311, 312-313, 314-315, 316-317, 318-319, 320-321, 322-323, 324-325, 326-327, 328-329, 330-331, 332-333, 334-335, 336-337, 338-339, 340-341, 342-343, 344-345, 346-347, 348-349, 350-351, 352-353, 354-355, 356-357, 358-359, 360-361, 362-363, 364-365, 366-367, 368-369, 370-371, 372-373, 374-375, 376-377, 378-379, 380-381, 382-383, 384-385, 386-387, 388-389, 390-391, 392-393, 394-395, 396-397, 398-399, 400-401, 402-403, 404-405, 406-407, 408-409, 410-411, 412-413, 414-415, 416-417, 418-419, 420-421, 422-423, 424-425, 426-427, 428-429, 430-431, 432-433, 434-435, 436-437, 438-439, 440-441, 442-443, 444-445, 446-447, 448-449, 450-451, 452-453, 454-455, 456-457, 458-459, 460-461, 462-463, 464-465, 466-467, 468-469, 470-471, 472-473, 474-475, 476-477, 478-479, 480-481, 482-483, 484-485, 486-487, 488-489, 490-491, 492-493, 494-495, 496-497, 498-499, 500-501, 502-503, 504-505, 506-507, 508-509, 510-511, 512-513, 514-515, 516-517, 518-519, 520-521, 522-523, 524-525, 526-527, 528-529, 530-531, 532-533, 534-535, 536-537, 538-539, 540-541, 542-543, 544-545, 546-547, 548-549, 550-551, 552-553, 554-555, 556-557, 558-559, 560-561, 562-563, 564-565, 566-567, 568-569, 570-571, 572-573, 574-575, 576-577, 578-579, 580-581, 582-583, 584-585, 586-587, 588-589, 590-591, 592-593, 594-595, 596-597, 598-599, 600-601, 602-603, 604-605, 606-607, 608-609, 610-611, 612-613, 614-615, 616-617, 618-619, 620-621, 622-623, 624-625, 626-627, 628-629, 630-631, 632-633, 634-635, 636-637, 638-639, 640-641, 642-643, 644-645, 646-647, 648-649, 650-651, 652-653, 654-655, 656-657, 658-659, 660-661, 662-663, 664-665, 666-667, 668-669, 670-671, 672-673, 674-675, 676-677, 678-679, 680-681, 682-683, 684-685, 686-687, 688-689, 690-691, 692-693, 694-695, 696-697, 698-699, 700-701, 702-703, 704-705, 706-707, 708-709, 710-711, 712-713, 714-715, 716-717, 718-719, 720-721, 722-723, 724-725, 726-727, 728-729, 730-731, 732-733, 734-735, 736-737, 738-739, 740-741, 742-743, 744-745, 746-747, 748-749, 750-751, 752-753, 754-755, 756-757, 758-759, 760-761, 762-763, 764-765, 766-767, 768-769, 770-771, 772-773, 774-775, 776-777, 778-779, 780-781, 782-783, 784-785, 786-787, 788-789, 790-791, 792-793, 794-795, 796-797, 798-799, 800-801, 802-803, 804-805, 806-807, 808-809, 810-811, 812-813, 814-815, 816-817, 818-819, 820-821, 822-823, 824-825, 826-827, 828-829, 830-831, 832-833, 834-835, 836-837, 838-839, 840-841, 842-843, 844-845, 846-847, 848-849, 850-851, 852-853, 854-855, 856-857, 858-859, 860-861, 862-863, 864-865, 866-867, 868-869, 870-871, 872-873, 874-875, 876-877, 878-879, 880-881, 882-883, 884-885, 886-887, 888-889, 890-891, 892-893, 894-895, 896-897, 898-899, 900-901, 902-903, 904-905, 906-907, 908-909, 910-911, 912-913, 914-915, 916-917, 918-919, 920-921, 922-923, 924-925, 926-927, 928-929, 930-931, 932-933, 934-935, 936-937, 938-939, 940-941, 942-943, 944-945, 946-947, 948-949, 950-951, 952-953, 954-955, 956-957, 958-959, 960-961, 962-963, 964-965, 966-967, 968-969, 970-971, 972-973, 974-975, 976-977, 978-979, 980-981, 982-983, 984-985, 986-987, 988-989, 990-991, 992-993, 994-995, 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2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 242

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

257

abet.

Received April 22-93

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257 I.A. 659

General No. 8375

Agenda No. 22

October Term, A. D. 1929

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

vs.

FRANK A'HEARN, Appellant

Appeal from County Court, Fulton County

ELDREDGE, P. J.

Iva Ruth Mahr, an unmarried woman, filed her complaint charging appellant with being the father of her child. Upon a trial in the County Court he was found guilty. To reverse the judgment entered in said cause this appeal is taken.

Iva Ruth Mahr during the month of November 1926 was working as a domestic in the home of Morris A'Hearn, father of appellant, and Matilda A'Hearn, his wife, stepmother of appellant, in the country about twenty-one miles northeast of Canton, Illinois, in which city appellant was at that time teaching school and roomed and boarded. Morris A'Hearn was an old man passed 70 years of age and his wife, Matilda, was an invalid suffering from diabetes. The house in which they lived had four rooms down stairs and four upstairs. Morris A'Hearn occupied a bedroom downstairs and his wife occupied the front room downstairs.

The prosecutrix occupied the northeast bedroom upstairs and appellant had a room also upstairs which he occupied when he visited his father and stepmother. The home of Morris A'Hearn and his wife was also about half a mile west of the town of Ellisville. Appellant was principal of the McCall School in Canton at the time in question and while teaching school there had a room in the home of Mr. and Mrs. Charles Romine at 443 East Locust Street. Occasionally on Friday afternoons or Saturdays he would visit his father and stepmother at their home in the country. The prosecutrix testified that her home was in Fairview in Fulton County when she was not working; that on the afternoon of November 4, 1926 the witness Fred Rheim called for her at the A'Hearn home in the country and took her and Mr. and Mrs. A'Hearn in his automobile to Fairview where he left her at her home and then proceeded with Mr. and Mrs. A'Hearn to the City of Canton; that she remained at her home with her mother and sister until about 5:00 o'clock on the evening of November 5, when appellant called at her home with his father and stepmother in his automobile and she left with them for the A'Hearn home in the country; that they arrived there about six o'clock when she got supper and that after supper about 6:30 P. M. appellant

left the home of his father in his automobile stating he was going to Ellisville; that she retired to her bedroom in the second story of the house about nine o'clock and went to sleep; that sometime during the night after she had been asleep several hours appellant came into her room and got in bed with her; that she could see his face on account of the moonlight; that he had intercourse with her and stayed with her a couple of hours and left before daylight; that they talked together during the time he was with her and she saw his features and recognized his voice; that she made no protest or objection to what he did; that she got up the next morning between 6 and 6:30 o'clock and prepared breakfast and that appellant was there for breakfast; that she never made any complaint to anybody about the occurrence and never told appellant that she was to have a child until he was arrested; that she never had had sexual intercourse with appellant at any other time or place than on this Friday night, November 5, 1926. Appellant denied that he was out to his father's home on the night in question. Before the trial his father had died and at the time of the trial his stepmother was too ill to be present as a witness. Appellant introduced the testimony of a number of witnesses, members of the Odd Fellows Lodge at Canton, in which

they stated that appellant was in Canton between 6 o'clock and 12 o'clock on the night of November 5 and that he took part in the work of the lodge that evening. Mrs. Romine testified that night she heard him come into the house and go to his bedroom and that in the morning his bed had the appearance of having been occupied during the night and was made up by her.

Complaint is made of a number of the instructions given on behalf of appellee. The eighth instruction is as follows: "8. The Court instructs the jury that before the defendant can avail himself of the defense of an alibi, the proof must cover the whole of the time of the transaction, so as to render it impossible or highly improbable that the defendant could have committed the act, and unless the proof in this case covers the whole time, so as to render the commission of the transaction by the defendant impossible or highly improbable, then that defense is not available to such defendant." In criminal cases such instructions have been held erroneous when the evidence of the alibi covered the whole of the time occupied in the commission of the crime. **People v. Frugoli**, 234 Ill. 324; **People v. Reno**, 324 Ill. 484; **People v. Braidman**, 323 Ill. 37. Appellant's testimony covered the whole period of the time of the transaction

in question. Bastardy proceedings although criminal in the form of the method of their institution, being by complaint and arrest, are in effect civil actions. The rules of evidence and the degree of evidence necessary to find the defendant guilty are the same as in civil actions, and it is doubtful whether the defense of alibi has any place in cases of bastardy. The evidence introduced on behalf of appellant not only tended to prove that he was not present at the time and place in question but also to discredit the testimony of the prosecutrix that he was at the home of his father between 6 and 6:30 o'clock that evening. If this had been a criminal prosecution for rape the instruction would have been erroneous and we see no reason why it should not be held erroneous in this proceeding because the testimony of appellant covered the whole time of the transaction. The ninth instruction is as follows: "9. You are instructed by the Court that by law the defendant is a competent witness in his own behalf, still in passing upon his evidence you have a right to take into consideration his interest in the result of the suit, his demeanor while on the stand, his conduct at the trial, so far as the same is disclosed by the evidence, and if from all the evidence and circumstances in the case you believe from a greater weight thereof that he is the

father of the child in question, then you should so find by your verdict." It has been repeatedly held that an instruction which directs the jury to consider the conduct and demeanor of a defendant at the trial is erroneous. **Purdy v. People**, 140 Ill. 46; **Vale v. People**, 161 Ill. 309; **People v. McGinnis**, 234 Ill. 68; **People v. Toohey**, 319 Ill. 113.

Instruction No. 13 is as follows: "13. In passing on the weight and credit to be given to the prosecuting witness, you should take into consideration, so far as the same is shown by the evidence, her condition immediately before and at the time of the act of intercourse which caused conception in this case, and if you believe, from all such facts and circumstances that the bastard child was begotten by the defendant, at the time, as testified to by the complaining witness, then you should so find by your verdict." This instruction selects a few particular facts of the case and directs the jury that they should take them into consideration and ignores all other facts which were just as necessary and material to be considered by the jury in arriving at a verdict. It also assumes that such facts are proven by a preponderance of the evidence and are true. Such instructions have been so frequently condemned that citations of authorities holding them

to be erroneous are superfluous.

Fred Rheim was one of the panel of jurors from which the jury was selected to try the case. His wife's mother married the father of the prosecutrix. Two of the jurors who were selected to try the case, Stanley Stanko and Henry Roberts lived at Canton which was 14 miles from the Court House in Lewistown where the case was tried. In support of the motion for a new trial an affidavit was made in which it was averred that said Rheim for three days transported said jurors from Canton to Lewistown and return in his automobile and that he daily intermingled and conversed with said jurors and other members of the jury and that said jurors knew that Rheim was to be a witness in the case because they were asked when examined on their **voir dire** if the fact that Rheim might be a witness would cause them to give any greater weight to his testimony than that of any other witness by reason of his being associated with them as a member of the same panel of jurors, to which they replied that they would not; and that said jurors also knew that Rheim was a witness in the case after the first day of the trial because he testified on behalf of the prosecutrix on that date. These two jurors and also Rheim made their respective affidavits in

which they in substance deposed that while they rode in Rheim's automobile back and forth between Canton and Lewistown while acting as jurors on the trial of the case they did not discuss the case in any way with said Rheim. Conceding that the merits of the case were not discussed by Rheim and the two jurors yet it was highly improper for the latter, knowing that Rheim was a witness in the case for the prosecutrix and his close family relations with her, to put themselves under such obligations to him and in fact to associate so intimately with him during the progress of the trial. The conduct of jurors during a trial in which they act as such should be above suspicion.

For the reasons above stated the judgment in this case must be reversed and the cause remanded.

abst.

Quinn filed April 22-1930

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257 I.A. 659²

General No. 8378

Agenda No. 10

October Term, A. D. 1929

STATE OF ILLINOIS, Appellee,

vs.

LOUIS DEPAPE AND LOUISE DEPAPE,

Appellants.

Appeal from County Court, Christian County.

ELDREDGE, P. J.

This is an appeal from a decree of the County Court of Christian County growing out of a bill in chancery brought by the State's Attorney under the Illinois Prohibition Law alleging that a nuisance as defined by Section 22 was being maintained on the following described property: Lot two (2) and the south six (6) feet of Lot one (1) in Block one (1) in the original Town (now City of Pana) of Pana in the County of Christian and the State of Illinois.

On this property was located a hotel known as the Fleck Hotel. The defendants were husband and wife and the title to the real estate was in Louise DePape. Louis DePape has died since the decree in this cause was rendered. Mr. and Mrs. DePape occupied this hotel as a residence using the first floor as such and there are fifteen rooms on the second story of the building which are rented to guests of the hotel.

Back of the hotel kitchen is the laundry room and from it access may be had to and from a building used as a garage which adjoins the rear of the hotel and is built out to an alley. The evidence shows that on the 14th day of February, 1929 Pete Phelps and Leo Phelps purchased intoxicating liquor in the laundry room and that they gained access thereto by way of the garage. They purchased the liquor from Louis DePape. There are proofs of several other sales of intoxicating liquor made by Louis DePape in the laundry room prior to the day mentioned. The Court found that a nuisance was maintained by the defendants upon the premises and that the same should be abated and it was ordered that the sheriff close, seal and lock said garage and wash room for a period of one year from the date of the decree and that all persons be enjoined from using or occupying said garage or wash room for any purpose whatsoever for that period. The first error assigned is that the evidence is insufficient to sustain the finding of the decree as to the sales of liquor mentioned. In our opinion the evidence is sufficient to prove these facts. We think, however, that the Court erred in ordering that the garage be closed in the manner provided by the decree for the reason that the proofs do not show that any intoxicating

liquor was ever sold in the garage or kept there for sale. The mere fact that occasionally someone purchased liquor in the wash room and passed through the garage to get to the same is not sufficient to show that the garage was a nuisance under said act. It is further urged that the evidence does not prove that Mrs. DePape had any knowledge of the use made of the laundry or wash room of the sale of intoxicating liquor therein. Louis DePape was her husband and they both lived there on the premises. The statute does not require that the owner of a building where such unlawful acts take place to have actual knowledge thereof. Under the evidence introduced Mrs. DePape had reason to believe that such sales were made by her husband and that is sufficient to sustain the decree. It is also urged that as Louis DePape is now deceased the decree is abated. Proceedings of this character are generally considered actions *in rem* and his death can have no effect on the decree.

The decree of the County Court is affirmed in all respects except as to the closing of the garage and as to that part of the decree it is reversed and cause remanded with directions to eliminate therefrom the closing of the garage.

Abet

Common filed April 22 - 1930

39

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257 I.A. 659³

General No. 8396

Agenda No. 13

January Term, A. D. 1930

PEOPLE OF THE STATE OF ILLINOIS, Defendant
in Error,
vs.

LUTHER ST. JOHN, Plaintiff in Error.

Error to County Court, Coles County,

ELDREDGE, P. J.

The plaintiff in error was found guilty under an information filed by the State's Attorney of Coles County charging in the first count unlawful possession of intoxicating liquor and in the second count the unlawful transportation of the same. The verdict of the jury was as follows: "We the jury find the defendant guilty on two accounts, one transporting intoxicating liquor, one possessing intoxicating liquor." A substantially similar verdict was rendered in the case of **People v. Ayers**, 250 Ill. App. 526 and this Court held that such a verdict was insufficient on which to base a judgment of conviction.

The only evidence introduced on the part of the people was in regard to the possession and transportation of the liquor in question on July 24, 1929. The defendant on cross examination by the State's Attorney was asked if he had not had intoxicating

liquor in his possession within twelve months prior to July 24, 1929. Objection was made to this question on the ground that it would be forcing the defendant to incriminate himself concerning the charge in no way connected with the charge upon which he was being tried. The Court overruled the objection and forced the defendant to answer which he did in the affirmative. At the close of all the evidence the Court excluded this evidence. The harm had already been done and the defendant was manifestly prejudiced by being compelled to testify against himself. **People v. Newmark**, 312 Ill. 632; **People v. Temple**, 295 Ill. 463. The exclusion of the evidence did not cure the error.

The first instruction given on behalf of appellee is a verbatim copy of that section of the law which provides that any person who manufactures, transports, possesses or sells liquor in violation of this Act shall for a first offense be fined not less than one hundred dollars nor more than one thousand dollars or be imprisoned not less than sixty days nor more than six months, or both, and for a second or subsequent offense shall be fined not less than five hundred dollars nor more than fifteen hundred dollars and be imprisoned in the State Penitentiary not less than one year nor more than two

years. The defendant was not accused of manufacturing or selling liquor nor was he on trial for a second offense. While it has been generally held that it is not error to give an instruction in the language of the statute provided the law there announced is applied to the facts in the case, such a rule does not obtain where the statute defines more crimes than that with which the defendant is charged. **People v. Crane**, 302 Ill. 217; **People v. Jones**, 263 Ill. 564. The second and third instructions define the words, "reasonable doubt," and attempts to set out what kind of a doubt the jury would be justified in finding the defendant not guilty. The words, "reasonable doubt," are self-explanatory and have been condemned in many cases. **People v. Niles**, 254 Ill. App. 120 and cases cited. The fourth instruction given for the people sets out in *haec verba* section 2 of the Prohibition Act containing the provision that said Act should be liberally construed to the end that the use of intoxicating liquors as a beverage may be prevented. We held in the case of **People v. Hyde**, Ill. App., that this section of the Act is for the benefit of the courts and their guidance in the construction thereof and that it was erroneous to instruct the

jury that they were at liberty to liberally construe the law. This instruction has also been held to be erroneous in *People v. Crane supra* and *People v. Jones supra*. The fifth instruction informs the jury that the possession of intoxicating liquors by any person not legally permitted under the law to possess them shall be **prima facie** evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the Act and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed or used, etc. The defendant was not charged with the unlawful possession of liquor for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the Act. The information did not charge any of the crimes mentioned in this instruction and it was error to give it. Defendants charged with violations of the Prohibition Act are as much entitled to a fair trial as those charged with the violation of any other criminal law and verdicts rendered under erroneous instructions and incompetent evidence can not be sustained.

The judgment of the County Court is reversed and the cause remanded.

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Opinion filed April 22 - 1930

40

A

257 I.A. 659⁴

General No. 8399

Agenda No. 16

January Term, A. D. 1930

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs.

THOMAS CRAFT, Plaintiff in Error.

Error to County Court, Coles County.

ELDREDGE, P. J.

Plaintiff in error was convicted in the County Court of Coles County under an information charging him with driving and operating a motor vehicle upon the public highways on April 12, 1929 while intoxicated. He was sentenced to pay a fine of \$100.00 and to serve sixty days on the Penal Farm at Vandalia, Illinois. The information contains two counts each charging the same offense in somewhat different language and the first error assigned is that the jury found the defendant guilty of driving a motor vehicle while intoxicated in manner and form as charged in the information and did not designate in the verdict under which count the verdict was rendered. As both counts charged the same offense the assignment of error is without merit. It is next urged that there was no evidence that he drove the automobile upon any public highway of the



State. The evidence shows that he drove the automobile on the streets of the Village of Bushton and upon the highways leading into said Village. It is next urged that the evidence does not show that he was intoxicated within the meaning of the statute; that the term "intoxicating" means more than slight stimulation. It is shown by the evidence by a number of witnesses from the way he staggered while walking and the language he used and the manner in which he drove the car that he was intoxicated. The plaintiff in error did not himself testify nor introduce any evidence on his own behalf. The evidence on behalf of the People fully sustained the charge in the information. It is also urged that the Court permitted witnesses to testify whose names were not endorsed on the information. There is no rule of law which holds that the names of witnesses must be endorsed upon informations and even in cases of indictments the Court may allow witnesses to testify on the trial whose names have not been endorsed upon the indictment. **People v. Curran**, 286 Ill. 303. Some objections have been made to the instructions given but as these have not been abstracted we can not consider them.

The judgment of the County Court is affirmed.

abst-

Ogden filed April 22 - 1930

417

257 I.A. 659⁵

General No. 8412

Agenda No. 25

January Term, A. D. 1930

IN RE: ESTATE OF PLEASANT I. OGDEN,
ALLEGED TO BE INSANE

Appeal from Circuit Court, Vermilion County.

ELDREDGE, P. J.

Pearl Shed and Clara Davis, two married daughters of Pleasant I. Ogden filed their petition in the Probate Court of Vermilion County for the appointment of a conservator for their father on the ground that he was incapable of managing and caring for his estate by reason of his unsoundness of mind. Upon a hearing upon this petition the jury found their verdict in the affirmative. An appeal was taken to the Circuit Court where upon another hearing the jury rendered a similar verdict that said Ogden was a person who by reason of unsoundness of mind was incapable of managing and caring for his own estate. While the evidence is more or less conflicting yet there is ample evidence in the record to sustain the verdict. The verdict was approved by the Probate Court and by the Circuit Court. As two juries have made the same finding and as two judges have approved of the verdicts this Court would not be justified in reversing the judgment especially as the verdicts were not contrary to the manifest weight of the evidence. Complaint is

made of the refusal of the Circuit Court to give one of the instructions asked on behalf of the alleged complainant. The jury were fully instructed as to the issues in the case which it was to determine and the refused instruction was not reversible error.

For the reasons stated the judgment of the Circuit Court is affirmed.

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General No. 8325

Agenda No. 12

April Term, 1929

PHIL STEWART & COMPANY, a Corporation,
Appellee

vs.

E. I. DuPONT DeNEMOURS & COMPANY,
a Corporation, Appellant.

Appeal from Sangamon

NIEHAUS, J.

257 I.A. 680

In this case, Phil Stewart & Company, the appellee, sued the appellant, E. I. duPont deNemours & Company, to recover damages claimed to have resulted to the appellee, from an alleged breach of warranty of certain paint materials sold to the appellee to be used for refinishing bodies of automobiles.

The declaration filed in the case, two counts, contains the following allegation, concerning the subject matter of the suit:

Count One alleges that on January, 1924, the defendant manufactured paints for finishing the bodies of automobiles.

That one Phil Stewart was then engaged in finishing the bodies of automobiles in Springfield, Illinois.

That on June 12, 1924, said Stewart and Urban L. Schavo entered a partnership for the same purpose and the business of Phil Stewart was transferred to the partnership.

That plaintiff was incorporated in Illinois August 2, 1924, and all assets of the partnership were transferred to plaintiff.

That in January, 1924, defendant by E. H. Garrison, its Western District Manager, promised Phil Stewart that products of defendant bought and used by Phil Stewart would be reasonably fit for use on automobiles, and these promises were, repeated to the partnership and the plaintiff.

By reason of these promises and the statute, the defendant expressly warranted that its products sold to defendant would be reasonably fit for finishing the bodies of automobiles.

Phil Stewart and his successors relying on the promises bought and used in the finishing of automobiles the products of the defendant.

That the products of defendant were not reasonably fit for use on automobiles, whereby the said products when applied to the bodies of one hundred forty-five automobiles then and there wholly cracked, chipped, peeled, broke and became and were wholly unfit and of no use whatsoever. Thereby Phil Stewart, the partnership, and the plaintiff were compelled to and did wholly refinish the bodies of one hundred forty-five automobiles at an average cost of \$75.00 each, without charge to the owners, to the damage of plaintiff of \$10,875.00.

That the plaintiff suffered other damage to the extent of \$5000.00.

By assignment the plaintiff is the owner of all of the claims of Phil Stewart, the partnership and the corporation.

In Count Two it is alleged that in January, 1924, defendant was in the business of preparing and manufacturing paints for the purpose of finishing the bodies of automobiles.

Phil Stewart was then engaged in finishing and refinishing automobiles in Springfield, Illinois.

On June 12, 1924, Stewart and Urban L. Schavo entered into a partnership to prosecute the business aforesaid.

On August 2, 1924, plaintiff was incorporated in Illinois to prosecute the same business and all claims of Phil Stewart and Urban L. Schavo were assigned to the plaintiff.

That from January to June 12, 1924, Phil Stewart bought paint products from defendant at the market price therefor and applied the same in finishing automobiles for customers; that the partnership continued the same course of business buying from the defendant, and the plaintiff thereafter did the same.

That the defendant well knew Phil Stewart and his successors used the paint products of defendant to refinish the bodies of automobiles.

That the said paint products of defendant were not reasonably fit for the purpose aforesaid, but were wholly unfit whereby when applied to the bodies of one hundred forty-five automobiles the said paint products wholly cracked, chipped, peeled, broke and became and were wholly unfit and of no use whatsoever. Thereby plaintiff was compelled to refinish the bodies of one hundred forty-five automobiles without cost to the owners and at an average cost of \$75.00 each to plaintiff, to its damage in the sum of \$10,875.00.

Because of the unfitness of the paint products of defendant and the interruption of established business by refinishing one hundred forty-five automobiles, plaintiff suffered additional damages in the sum of \$5000.00.

That at various times since the purchase of the paint products of defendant and since it appeared that the same were not reasonably fit for the use intended, and in consideration that plaintiff would continue to buy the paint products of defendant, the defendant promised that it would repay plaintiff all loss and damage sustained by plaintiff, or Phil Stewart, or the partnership on account of such unfitness.

Although plaintiff kept the promise to purchase the paint products of defendant, the defendant has wholly failed to keep its promise to pay the said damages.

Plaintiff is the owner by assignment of all the claims of Phil Stewart and the partnership.

The appellant defendant pleaded the general issue to the declaration.

There was a trial by jury in the circuit court of Sangamon county, and a verdict and judgment in favor of the appellee for the sum of \$6500.00.

It is urged on appeal, that the verdict of the jury was manifestly against the weight of the evidence; and that the trial court should have directed a verdict for the appellant on the issues involved.

On a review of the evidence, we conclude that this contention of the appellant is not well founded; that the evidence clearly tends to show, that the painting materials sold to the appellee for repainting and refinishing automobiles were deficient for the purpose for which they were sold; and did not comply with the representations alleged to have been by its sale agent, concerning their fitness, and the results to be attained in their use; and that damages resulted to the appellee therefrom by incurring the expense necessarily incidental to the process of repainting and refinishing the automobiles upon which the materials had been used; and the court therefore properly refused to direct a verdict for the appellant.

It is also contended, that the court erred in admitting the testimony of Phil Stewart as to conversation had with E. H. Garrison, appellant's Western District Manager in the sale and distribution of the paint materials involved in this suit.

The appellant argues, that "over repeated objection of appellant, Stewart and Schavo were permitted to testify repeatedly that they told Garrison that duPont Pyroxylin was going bad and that he said 'I know that, we are having that trouble. You go ahead and take care of it. We will take care of you on it;' that Garrison said, to refinish these cars and duPont would take care of it; and that Garrison said duPont was a big concern in business a hundred years, and would take care of me on it;' and that in answer to Stewart's statement that 'practically every car in the first three or four hundred had to have something done on it,' he replied, 'he would try to have it taken care of for us.' This evidence was competent inasmuch as Garrison was the general agent of the appellant in this territory for the sale and distribution of the painting materials referred to; and all the business with reference to the purchase and the use of the painting material referred to, was transacted by the appellee and its predecessors in business, with Garrison as such general agent; and it was also competent because it tended to show, that the appellant through Garrison had reasonable notice of the defect claimed by appellee in the painting materials and the lack of apparent fitness inherent therein for the uses and purposes for which it is alleged the appellant had sold them to the appellee; and a notice of the alleged fact that the painting materials did not comply with the representa-

tions which they claimed were made by Garrison with reference to their fitness for which they were sold. The statement of Mr. Moosman, who was Assistant Division Manager of the Sales Department of the appellant, and had supervision thereof, which was admitted in evidence, we regard as competent because it tended to show, that the appellant had knowledge of the deficiencies in the painting materials sold by appellant, including those in question. A principal is bound by the statements and representations of a general agent in the conduct of the business in which the principal is engaged. Where the agency is general as between principal and third parties; the principal is bound by all acts of the agent which are within the apparent scope of his authority. 2 Corpus Juris 602; **Woodford v. McClenahan** 9 Ill. 85; **Eckhart Carriage Co. v. Eden** 163 Ill. App. 552; **Brown v. Johnson-Brown Co.** (Ga) 126 SE 550; **Federal Rubber Mfg. Co. v. Plow City Garage** 204 Ill. App. 186; Story on Agency Sec. 59; Mechem on Agency (1st Ed.) Sec. 283; **Burba v. Baltic American Line**, 233 Ill. App. 132; **Faber-Musser Co. v. Dee Clay Co.**, 291 Ill. 240. And under the Uniform Sales Act any affirmation of fact or any promise by the seller relating to goods, is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. Cap. 121-A Par. 15 Sec. 12 Revised Statutes-Cahill.

It is contended by the appellant also, that Instructions 1, 2, 3 and 4 are misleading and not correct statements of the law pertaining to the appellee's right of recovery. An examination of the instructions, however, leads us to the conclusion, that the instructions contain substantially correct statements of the law pertaining to the cause of action averred in the declaration.

It is further contended, that appellee's instruction No. 4 ignores appellant's defenses, namely, of an account stated between the parties; and the defense of accord and satisfaction. It is sufficient to say with reference to the latter contention, that no such defense appears to be involved in the case; either in the pleadings or the evidence; and therefore this contention is without merit.

The record does not disclose any reversible error, and the judgment is therefore affirmed.

Judgment affirmed.



Abet

Opinion filed April 22 - 1930

43

A

257 I.A. 660²

General No. 8402

Agenda No. 18

January Term, 1930

AMANDA J. EDENBURN, Executrix of the Last
Will and Testament of William T. Eden-
burn, Deceased, Appellee,

vs.

M. S. CAMPBELL, Appellant.

Appeal from Vermilion.

NIEHAUS, J.

This is an action of assumpsit brought by the appellee, Amanda J. Edenburn as Executrix of the Last Will and Testament of William T. Edenburn, Deceased, in the circuit court of Vermilion county against the appellant, M. S. Campbell, to recover a balance due on a promissory note dated May 19, 1920, for the sum of \$2500.00, payable to the order of the deceased, William T. Edenburn, one year after the date thereof, with six per cent interest if paid when due, if not, seven per cent from date. The note was payable at the Peoples State Bank of Collison, Illinois. The makers of the note were Glenn V. Davis, Flora Davis and Davis & Davis.

The appellant was not one of the makers of the note; nor an endorser nor a guarantor thereof; nor is there any evidence of any promise made by him, to pay the note or any balance that might remain unpaid thereon. The trial of the case resulted in a verdict and judgment for the appellee for the sum of \$1281.75,

the unpaid balance of the note in controversy; and this appeal is prosecuted from the judgment.

A number of questions are raised on appeal in connection with the assignments of error; but upon examination of the record, we deem it sufficient for the purposes of a review of the proceedings of the trial court to consider and determine the questions raised by the assignment of error, that there is no evidence to support the verdict and judgment.

The evidence shows, that the note in question was left for collection at the Peoples State Bank of Col-lison, of which the appellant, M. S. Campbell, was cashier; that on May 27, 1926, the Bank collected for Edenburn the interest due amounting to \$175.00. Thereafter on May 25, 1927, the Bank collected for Edenburn on the note the annual interest due amounting to \$175.00. It also collected on the Principal of the note, the sum of \$500.00. The evidence shows, that one of the payments of interest which was endorsed on the note in question is in the hand writing of the appellant; the other endorsements are in the hand writing of the employes of the bank. And the declaration avers, that in addition to the \$500.00 which had been paid on the principal of the note, the sum of \$858.14 was collected from the Bankrupt Es-tates of the makers of the note; and that there remains due and unpaid on said note, the sum of \$1281.76.

The appellee bases her right of recovery from the appellant on the averments in the special count, which are as follows:

“For that whereas, on, to wit: May 28th, A. D. 1919, while the defendant was a banker and money loaner, and William T. Edenburn was a depositor of Forty Five Hundred (\$4500.00) Dollars of his money in the Peoples Bank of Collison, Illinois, and in which bank the defendant was then and there a stock holder, director and officer, said defendant undertook to safely and securely loan said money for the use and benefit of said William T. Edenburn, to safe and responsible borrowers and to use reasonable care and diligence in collecting the same; that said money was loaned by said defendant and reloaned from time to time with different sureties on the notes, until May 19, 1925, at which time said defendant negligently made an unsafe and insecure loan of Twenty Five Hundred (\$2500.00) Dollars, of said money on a note signed by Glenn V. Davis, Flora Davis, Davis & Davis, by R. L. Davis, and otherwise took no security whatever on said note, the said Glenn Davis then and there not being a safe or responsible person, nor were any of said sureties on said note then and there safe or responsible persons, all of which facts defendant then and there well knew; that said William T. Edenburn afterwards, on to wit: April 28th, 1928, died, and that prior to his death on December 7th, 1927, said Flora A. Davis then and there owing said defendant, he procured her to make a deed for all real estate owned by her, which left her insolvent; that on the 7th day of May, A. D. 1928, said borrower, Glenn V. Davis ceased doing business and was adjudicated a bankrupt, and the said Davis Bros., and Robert L. Davis on said date became bankrupt, and the said Flora A. Davis in the mean time died, leaving insufficient assets to pay said debt or any part of the same.”

The evidence shows, that Edenburn was a depositor in the Peoples Bank and its successor, the Peoples State Bank of Collison; and that all his transactions concerning his money matters were in charge of the Bank; and that the Bank also had complete charge of the collections of the money which become due from time to time on the notes of which he was the holder; and that the Bank had charge of the collections made on the Twenty Five Hundred Dollar note, which is the subject of this suit. There is no evidence in the record that the appellant had any-

thing to do with the monetary affairs of Edenburn, except as cashier of the bank. There is no evidence in the record to show that the appellant undertook to loan any money for the use and benefit of Edenburn; or at any time loaned any of his money for him; or that he reloaned any money for him from time to time with different sureties on notes; or that the Twenty Five Hundred Dollar note was taken for a loan made by the appellant; nor is there any evidence, that the appellant had anything to do with the collection of the Twenty Five Hundred Dollar note, except as cashier of the Bank; and that the only collection made by him as cashier for the bank was one annual interest payment of \$175.00 endorsed on the note. Nor is there any evidence to show that the makers of the Twenty Five Hundred Dollar note at the time it was made, namely, May 19th, 1925, were not solvent and financially responsible. There is no evidence of insolvency of the makers of the note until about three years after the date of the note; or about two years after the note became due and payable. We conclude therefore, that the evidence does not support the verdict and judgment; and that the appellee has not right of recovery against the appellant for the balance due on the note; nor for any other amount; and that there is no cause of action shown by the evidence.

For the reasons stated, the judgment is reversed.

Finding of fact to be embodied in the judgment:

There is no evidence to sustain the charges in the declaration upon which the appellee bases her right of recovery against appellant; and no cause of action shown by the evidence.

Judgment reversed, with finding of fact.

abst.

Decision filed April 22-1930

44

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257 I.A. 660³

General No. 8397

Agenda No. 14

January Term, A. D. 1930

THOMAS TOLBERT, Appellant,

vs.

MINNIE SNYDER, LE ROY TOLBERT, MARIE

TOLBERT McBRIDE, CARL SAAL, Ex-

ecutor of the Last Will and Testament

of MAUDE McMAHON, De-

ceased, et al., Appellees.

Appeal from the Circuit Court of Tazewell County
SHURTLEFF, J.

On January 27th, 1928, the appellant, Thomas Tolbert, filed a bill in chancery in the Circuit Court of Tazewell County, to construe the will of Maude McMahon, deceased. A copy of the will is attached to the bill and is dated September 13th, 1927. Maude McMahon died November 7, 1927, and left her surviving no child, or descendant of any child, but left her surviving Thomas Tolbert, the appellant, Harry Tolbert and Minnie Snyder, her brothers and sister, and also LeRoy Tolbert and Marie Tolbert McBride, her nephew and niece. The brother Harry Tolbert died November 28, 1927, leaving a will which named Thomas Tolbert, the appellant, as executor.

The first paragraph of the will of Maude McMahon provided for the payment of her debts and funeral expenses.

The second paragraph of the will bequeathed to her brother Appellant Thomas Tolbert five hundred dollars to be paid to him out of the personal property of her estate.

The third, fourth and fifth paragraphs of the will are as follows:

“Third: I give, devise and bequeath to my sister, Minnie Snyder, all the residue and remainder of my estate, both real and personal for her sole use, benefit and enjoyment as long as she may live with full power and authority to sell and dispose of the same or any portion thereof during her lifetime, and at her death if any portion of the real or personal property by this clause devised and bequeathed should remain undisposed of by said Minnie Snyder, it is my will that such remaining portion pass to and become the property of my brother, Thomas Tolbert.

“Fourth: It is my will that my said sister, Minnie Snyder, make suitable provision for our brother, Harry Tolbert, who is in failing health and now confined in the Oak Knoll Sanitarium, in Tazewell County, Illinois.

“Fifth: If said Minnie Snyder should die prior to the death of the said Harry Tolbert, it is my will that my brother, Thomas Tolbert, likewise provide for my said brother, Harry Tolbert, out of any portions of my estate that may come into his hands by way of the remainder as provided in the third clause of this will.”

The sixth paragraph nominated Carl Saal as executor. The will was admitted to probate by the Probate Court of Tazewell County, Illinois, on January 6, 1928, and Carl Saal qualified as executor.

The bill alleges that Maude McMahon left an estate of the value of thirty-eight thousand dollars, consisting of personal property valued at three thousand dollars, and improved real estate, situated in the Cities of Pekin and Peoria, Illinois, of the value of thirty-five thousand dollars.

The bill alleges that the income from the real and personal property belonging to the estate of Maude McMahon, amounting to

about five thousand dollars a year, was bequeathed by said will to Minnie Snyder; that said income from said real and personal property is more than sufficient to support the said Minnie Snyder in the manner in which she has been accustomed to live, and more than sufficient to support a person of her age, occupying her position in society; that the said Minnie Snyder and her attorney claim that under and by virtue of the terms of the will of Maude McMahon, and particularly under the third paragraph thereof, that the said Minnie Snyder was given full right and authority to sell and dispose of, in fee simple, any portion or all of said real and personal property, as she may see fit, with full right and authority to use, give away for charitable or other purposes, or otherwise dispose of, not only the income from the proceeds of any such sales of said real or personal property, but also the principal thereof, without any right of interference therewith on the part of the appellant.

The bill also alleges that the terms of said will are ambiguous and uncertain, and that the rights and interests of the appellant and Minnie Snyder under said will are uncertain, and alleges that Minnie Snyder is a person of little or no means outside of the interest which she takes under said will, and that if it should be determined by the court, upon the construction of said will, that Minnie Snyder has the right to dispose of any portion or all of the real and personal property other than her life estate therein, that the court should then find and decree that Minnie Snyder has no right to dispose of or use up any portion of the principal derived from the sale of any such property; that the principal derived from such sale or sales should be invested in such manner as should be directed by the court, and held by Minnie Snyder as trustee for the

appellant, and the income only to be used by Minnie Snyder.

The bill makes Minnie Snyder, LeRoy Tolbert, Marie Tolbert McBride, Thomas Tolbert, as executor of the will of Harry Tolbert, deceased, and Carl Saal, executor of the will of Maude McMahon, deceased, parties defendant, and prays that the court may construe the will of Maude McMahon, deceased, and ascertain and decree what the rights and interests of Minnie Snyder and appellant and the other parties to said proceeding are in and to said real and personal property; that the court may find and decree that Minnie Snyder has no right or authority to sell or dispose of any of said real estate in fee, but can only sell her life estate therein; that if the court should determine upon construction of said will that Minnie Snyder has the right to dispose of any portion or all of said real and personal property other than her life estate therein, that the court may decree that Minnie Snyder has no right to dispose of or use up any portion of the principal derived from the sale of said property; that the principal derived from such sale be invested in such manner as shall be directed by the court and held by Minnie Snyder as trustee for the appellant, and the income only used by Minnie Snyder, and that the necessary steps may be taken to preserve the corpus of said estate for the benefit of the appellant, and that the court may retain jurisdiction of the cause and require Minnie Snyder to report to the court from time to time concerning the condition of said estate; that Minnie Snyder may be required to give bond for the faithful handling of the proceeds of such sale or sales so as to insure the keeping of the corpus of said real estate intact for the benefit of the appellant at such time as he may become entitled to the same.

Answers were filed to the bill, there was a hearing before the master and before the court and a decree entered finding that the will of the said Maude McMahon, deceased, is not ambiguous, doubtful and uncertain or indefinite, and that no question as to the meaning of any portion of said will is presented requiring the construction of said will. It is therefore ordered, adjudged and decreed that the exceptions of Thomas Tolbert to the report of said master be and the same are overruled, and that as to the exceptions of the said Thomas Tolbert said master's report be approved and confirmed, and it is further ordered that the exception of Minnie Snyder and Carl Saal, as executor of the last will and testament of Maude McMahon, deceased, be and the same are sustained, and that the bill of complaint be dismissed for want of equity at the costs of the complainant.

The decree is based apparently upon the rule as laid down in **McClure v. McClure**, 319 Ill. 271; **Poll v. Cash**, 234 id. 55; **Greenough v. Greenough**, 284 id. 416; **McCarty v. McCarty**, 275 id. 573, and kindred cases.

In the argument of the cause appellants practically abandon all of their assignments of error except the seventh, in which appellants assign error because the court refused to re-refer the cause to hear testimony as to the extent and value of services rendered by complainant's solicitors and to tax the value thereof. It is only where there is sufficient ambiguity about the language of the testator to justify an application to a court of equity for the construction of a will that the costs of litigation must be borne by the estate.

Finding no error in the record, the decree of the Circuit Court of Tazewell County is affirmed.

Affirmed.

Agenda filed April 23-1930

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General No. 8410

Agenda No. 23

January Term, 1930

CAPITOLA WELLS, ET AL., Plaintiffs in Error,
vs.
SPRINGFIELD LIFE INSURANCE COMPANY, a
Corporation, Defendant in Error

Writ of Error to the Circuit Court of Montgomery
County

SHURTLEFF, J.

This is an action upon a policy of life insurance. The first special count of the declaration alleges that on February 16, 1899, a life insurance policy was executed by the supreme Court of Honor to J. O. Wells, the deceased, in which the said life insurance company agreed to pay to Melissa A. Wells, the mother of the deceased, the sum of two thousand dollars, upon the terms and conditions contained in the policy, which were set forth *in haec verba* therein. It is further alleged that the name of the insurer was changed to the Court of Honor, and later changed to the Court of Honor Life Association, and that on September 23d and 24th, 1924, the Springfield Life Insurance Company, defendant in error, was organized for the express purpose of taking over all the assets and assuming all of the liabilities and outstanding policies of the insurer; that by a majority vote of all the members of the insurer and the passage of a resolution by the Board of Directors of the insurer, and by the defendant in error, the said policies of the said insurer were assigned and transferred to the defendant in error, and the payment of all liability on the said policies, including the policy issued to the deceased, was

assumed by defendant in error, which assignment and assumption was thereafter approved and ratified by the Department of Trade and Commerce of the State of Illinois, and an insurance contract was thereupon issued by the defendant in error to the insured, and the defendant then and thereby became liable to pay to the beneficiaries under said policy the sum of two thousand dollars, upon the death of the insured; that the said beneficiary died on August 18, 1923, and that by reason of the provision of said policy and by-laws of the defendant, the defendant in error became liable to pay to the plaintiffs in error the face value of the said policy upon the death of the insured.

On March 31, 1927, in the City of Mt. Olive, Illinois, the insured died; that within the time required by the said policy plaintiffs in error notified defendant in error of said death, according to the terms and conditions of the policy, but that the defendant promptly denied liability on the said contract of insurance and refused to furnish proof of loss blanks, and that by reason thereof the plaintiffs in error have been unable to furnish proofs of loss according to the terms and conditions of the policy; that deceased kept and performed all the terms and provisions and conditions of the policy, and paid all premiums and assessments against him prior to his death, and that plaintiffs in error have at all times kept, performed, observed, and complied with all the terms and provisions of the policy on their part to be kept or performed, and alleges damages in the sum of two thousand dollars and the refusal and neglect by the defendant in error to pay the same.

The allegations of the second count of the declaration are the same as the allegations of the first count of the declaration, except it is alleged in the second count that the death of the insured occurred on April 1, 1927, and it is further alleged in said count that defendant in error, by reason of its conduct in receiving premiums repeatedly from the insured long after the time allowed for the payment of the same, as provided by the policy, that defendant in error is estopped to declare a forfeiture for the non-payment of the premiums.

The common counts and a copy of the account sued on was also included in the declaration.

To the declaration defendant filed a plea of the general issue with notice of special defenses as follows: that the policy sued on was issued by the Supreme Court of Honor, a fraternal benefit society, with a lodge system and with a ritualistic and a representative form of government, and providing for the payment of death benefits to the relatives of its members if dying while in good standing; that death benefits were to be paid from assessments collected from its members; that the policy sued on was issued to J. O. Wells at Taylorville, and was payable to Melissa A. Wells, his mother, subject to the conditions set forth in the policy, to wit: that the policy was issued on the express condition that the assured should comply with the constitution, laws, rules and regulations of the order then in force or thereafter placed in force, and that assessments should be paid within the time specified by the constitution, laws, rules, and regulations, and if not paid in accordance therewith, the policy should become null and void and so remain until payment in full, and the member reinstated; that deceased, by accepting the

policy, agreed to all the terms and conditions above enumerated; that the constitution and by-laws of the Supreme Court of Honor provided:

"There shall, without notice, be due from each benefit member of the society, on the first day of each calendar month, one benefit assessment and, unless otherwise included in the gross rate of assessment, a percapita tax of fifteen cents, provided that the payments may be made monthly, quarterly, semi-annually or annually in advance, as the member may elect, subject to all other provisions of the Constitution of the Society now in force or which may hereafter be adopted. A member who fails to pay such assessment on or before the last day of such calendar month or who fails to renew his quarterly, semi-annual, or annual assessment within thirty days of the expiration of the period for which he has paid, shall, subject to the non-forfeiture provisions in his certificate, **ipso facto**, without notice stand suspended from all benefits in the Society or the funds thereof, and all interests of the beneficiary or beneficiaries shall thereupon cease unless such member is subsequently reinstated, as provided by the Constitution of the Society.

"A member who has been suspended for non-payment of assessments, per capita tax, and local Court dues, or fines, may be reinstated within sixty days from date of suspension, if in good health, and if not engaged in any of the prohibited occupations or be reinstated at any time by furnishing satisfactory evidence of insurability and the payment of all arrearage and current contributions: Provided that the receipt and retention of such assessments, per capita tax, local Court dues and fines shall not have the effect of reinstating such suspended member nor entitle him or his beneficiaries to any rights under his certificate if he was not in good health at the time of such reinstatement."

It was charged that deceased did not comply with the laws and regulations or constitution and by-laws in that premiums and assessments were required to be paid on or before the last day of each month for which assessments or dues were levied and required to be paid; that an assessment in the sum of \$1.49 was levied against deceased for the month of March, 1927, and should have been paid on or before the 31st day of that month; that deceased did not pay the said premium to the defendant, and that deceased on the first day of April, 1927, died and the policy by virtue of its terms and conditions became null and void; that the said policy thereby lapsed and the right to reinstatement was personal to the deceased and upon his death did not inure to the beneficiaries; that after the policy lapsed for non-payment of premiums and dues, no proper or legal tender of payment of the said assessment or dues was made to the Supreme Court of Honor or to the defendant, or to anyone authorized to accept payment of the same, and that by reason thereof the said policy was not reinstated, nor did the defendant waive the right to have the premiums or assessments paid on the first day of the month or within thirty days thereafter.

There was a trial by jury, a verdict and judgment in behalf of defendant in error, and plaintiffs in error have brought the record, by writ of error, to this Court for review.

The testimony is undisputed that the March, 1927, assessment against the deceased remained unpaid and the preponderance of the testimony tends to show that deceased did not die on the 31st day of March but did die on April 1, 1927. It follows that the policy of insurance, under the terms of the contract, was cancelled by failure on the part of of the deceased

to pay the March, 1927, dues unless the conduct of defendant in error in accepting the payment of dues many times, as charged, after the expiration of the month, may be construed as a waiver of the provisions of the policy of insurance. Plaintiff in error offered a witness, Maude Munson, who had been a collector for defendant in error many years and who had collected the assessments from J. O. Wells upon said policy for several years. Checks were shown, given by the deceased to Maude Munson from one to three and four days after the close of the month, covering the assessment for the preceding month and made payable to the order of Maude Munson and cashed by her, but it was shown that in each case she had paid the assessment within the month from her own funds, and that the checks from Wells, the deceased, to her were merely to cancel his indebtedness to Munson, the collector. In no case prior to March, 1927, had the assessment of the deceased been permitted to run over the month unpaid and it was shown by the witness Maude Munson that prior to the month of March, 1927, she had notified the deceased that she would not again advance his assessments for him. This was the undisputed testimony. There are no proofs tending to show that defendant in error had any knowledge of the arrangement between the deceased and Munson or ever consented to a delay in payment. Apparently the deceased understood that his assessments had been advanced for him, as he made his checks payable to the order of Maude Munson personally.

In the view we take of the case the policy was forfeited and nothing that is said in **Dromgold v. Royal Neighbors**, 261 Ill. 60; **Jakes v. North American Union**, 186 Ill. App. 1, and **Anna Waerness v. Independent Order of Foresters**, 244 Ill. App.



III. Unpublished opinions

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